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VOL 3118

No. 15143✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

OLAA SUGAR COMPANY, LIMITED and
ILWU LOCAL 142, Respondents.

Transcript of Record

Petition for Enforcement of an Order of the National Labor
Relations Board

FILED

OCT -5 1956

PAUL P. O'BRIEN, CLERK

No. 15143

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Court of Appeals
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

OLAA SUGAR COMPANY, LIMITED and
ILWU LOCAL 142, Respondents.

Transcript of Record

Petition for Enforcement of an Order of the National Labor
Relations Board



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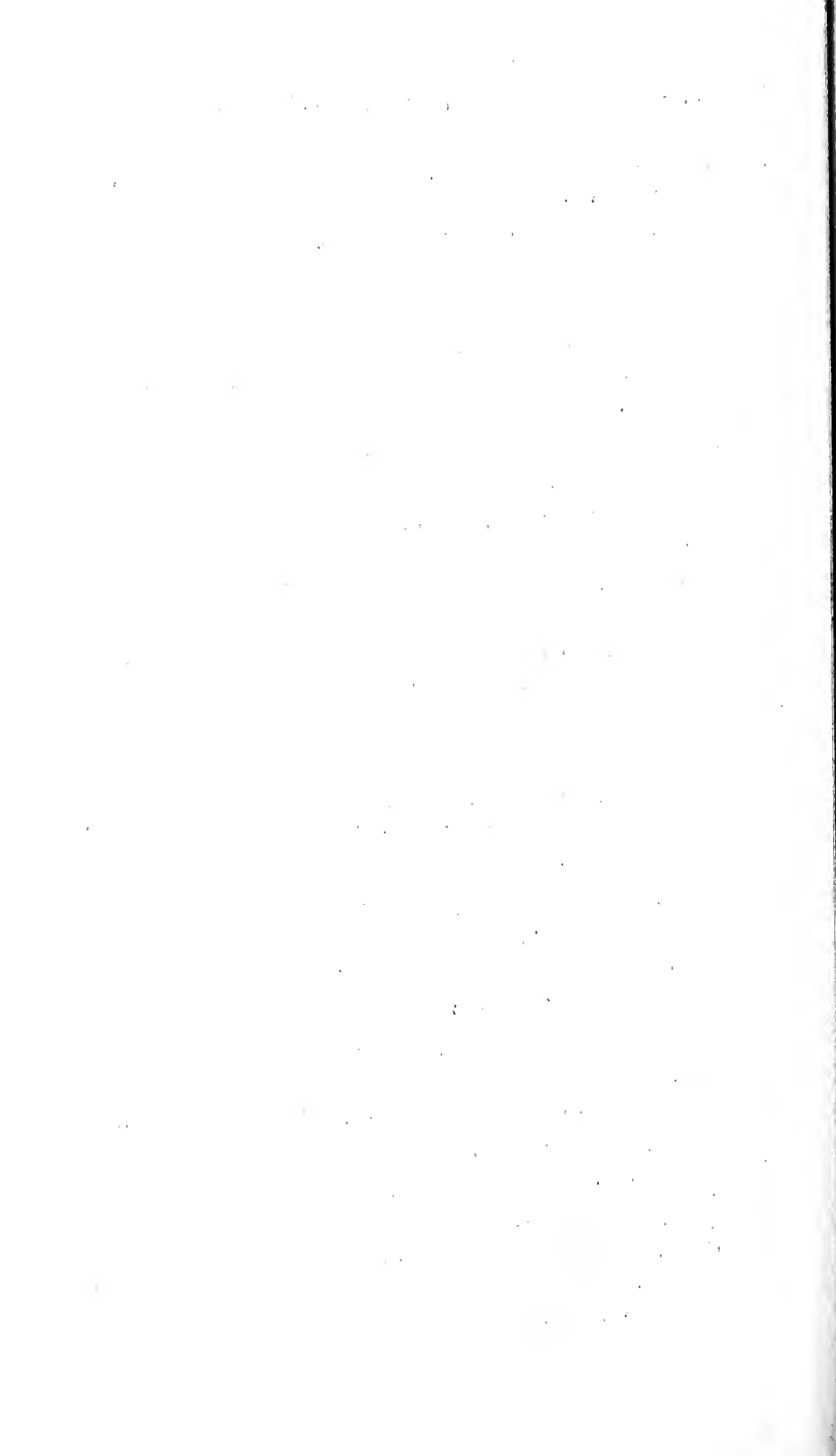
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 37-CA-84. Date Filed: January 6, 1954.
Compliance Status Checked By: wkt.

1. Employer Against Whom Charge Is Brought:

Name of Employer: Olaa Sugar Company, Limited.

Address of Establishment: Olaa, Hawaii.

Nature of Employer's Business: Sugar Plantation.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), Subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

8 (a) (3)

On or about December 17, 1953, the above-named Company through its Manager, C. E. S. Burns, Jr., discharged an employee, Favorito P. Banez, on demand of United Sugar Workers, ILWU Local 142, Unit 3, from which organization the aforesaid Favorita P. Banez was expelled because of his opposition to the union shop demand of the above-named Union. Furthermore, the aforesaid Company and

2 *National Labor Relations Board vs.*

the aforesaid Union have not signed a bona fide union shop contract which might justify discharge for failure to pay union dues to the Union.

8 (a) (1)

By these and other acts the above-named Company has interfered with, restrained and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act as amended.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: Favorito P. Banez.

4. Address: P. O. Box 332, Olaa, Hawaii.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit: —

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By FAVORITO P. BANEZ

Jan. 6, 1954.

Affidavit of Service by Mail and Postal Return Receipts attached.

GENERAL COUNSEL'S EXHIBIT No. 3

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

Case No. 37-CB-6. Date Filed: January 6, 1954.
Compliance Status Checked By: wkt.

1. Labor Organization or its Agents Against
Which Charge Is Brought:

Name: United Sugar Workers, ILWU Local
142, Unit 3.

Address: Olaa, Hawaii.

The above-named labor organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section (8b) Subsections (1) and 2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

8 (b) (2)

The above-named labor organization caused the Olaa Sugar Company, Limited, through C. E. S. Burns, Jr., Manager, on or about December 17, 1953 to discharge Favorito P. Banez for reasons other than refusal to tender periodic dues and initiation fees. Furthermore, the aforesaid Company and the aforesaid Union have not signed a bona fide

4 *National Labor Relations Board vs.*

union shop contract which might justify discharge for failure to pay union dues to the Union.

8 (b) (1)

By these and other acts and conduct, the aforesaid labor organization has interfered with, restrained and coerced employees of the Employer in the exercise of their rights as guaranteed in Section 7 of the Amended Act.

3. Name of Employer: Olaa Sugar Company, Limited.

4. Location of Plant: Olaa, Hawaii.

5. Type of Establishment: Sugar Plantation.

6. Identify Principal Product or Service: Sugar.

* * * * *

8. Full Name of Party Filing Charge: Favorito P. Banez.

9. Address of Party Filing Charge: P. O. Box 332, Olaa, Hawaii.

* * * * *

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By FAVORITO P. BANEZ

Jan. 6, 1954.

Affidavit of Service by Mail and Postal Return Receipts attached.

GENERAL COUNSEL'S EXHIBIT No. 7

United States of America

Before the
National Labor Relations Board
Twentieth Region

Case No. 37-CA-84

In the Matter of

OLAA SUGAR COMPANY, LIMITED,

and

FAVORITO P. BANEZ, AN INDIVIDUAL

Case No. 37-CB-6

In the Matter of

ILWU LOCAL 142

and

FAVORITO P. BANEZ, AN INDIVIDUAL

CONSOLIDATED COMPLAINT

It having been charged by Favorito P. Banez, an individual, that Olaa Sugar Company, Limited, and ILWU Local 142, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq., (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by Rules and Regulations of the National

Labor Relations Board, Series 6, as amended, Section 102.15, hereby issues this Complaint upon the charges duly consolidated pursuant to the provisions of Section 102.33(b) of the above Rules and Regulations, and alleges as follows:

I.

Olaa Sugar Company, Limited, herein called the Respondent Employer, a Hawaiian corporation with its principal office and place of business at Olaa, Territory of Hawaii, is engaged in the growing and processing of sugar cane. During the calendar year 1953, the Respondent Employer produced raw sugar and molasses at its place of business located at Olaa, valued in excess of \$2,000,000, substantially all of which was shipped to the mainland of the United States for refining. During the calendar year 1953, the value of supplies and equipment purchased by the Respondent Employer for use at its place of business located at Olaa, Island of Hawaii, and shipped to its said place of business from points outside the Territory of Hawaii exceeded \$500,000.

II.

ILWU Local 142, herein called the Respondent Union, is a labor organization within the meaning of Section 2(5) of the Act.

III.

On or about October 29, 1952, the Respondent Employer and the Respondent Union executed and became parties to a collective bargaining agree-

ment, the terms of which were in full force and effect at all times material herein. Said collective bargaining contract contained, among other matters, the following provisions:

Any claim by the Union that action on the job of a non-union employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruptions of harmonious working relations shall be grounds for discipline or discharge.

IV.

On or about December 17, 1953, the Respondent Union attempted to cause, and did cause, the Respondent Employer to discharge Favorito P. Banez as an employee pursuant to the provisions of the collective bargaining agreement, as set forth in paragraph III, above.

V.

On or about December 17, 1953, the Respondent Employer discharged Favorito P. Banez, an employee, at the request and upon the demand of the Respondent Union, pursuant to the provisions of the collective bargaining agreement, as set forth in paragraph III, above.

VI.

By reason of the provisions of the collective bargaining agreement of October 29, 1952, as set forth in paragraph III, above, and by reason of the acts set forth in paragraph IV, above, and by each of

said acts, the Respondent Union did cause, and is causing, the Respondent Employer to discriminate against Favorito P. Banez, an employee, in violation of Section 8 (a) (3) of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

VII.

By the acts set forth in paragraphs III and IV, above, and by each of said acts, the Respondent Union did restrain and coerce, and is restraining and coercing, the employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

VIII.

By reason of the provisions of the collective bargaining agreement of October 29, 1952, as set forth in paragraph III, above, and by reason of the acts set forth in paragraph V, above, and by each of said acts, the Respondent Employer did discriminate, and is discriminating, in regard to hire, tenure, terms and conditions of employment of Favorito P. Banez, an employee, thereby encouraging membership in the Respondent Union and discouraging membership in other labor organizations, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

IX.

By the acts set forth in paragraphs III and V, above, and by each of said acts, the Respondent Employer did interfere with, restrain, and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

X.

The acts of the Respondent Employer and the Respondent Union, as set forth in Paragraphs III, IV, and V, above, occurring in connection with the operations of the Respondent Employer described in paragraph I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States of the United States, and within the Territory of Hawaii, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XI.

The aforesaid acts of the Respondent Employer as set forth in paragraphs III and V, above, and the aforesaid acts and conduct of said Respondent Union, as set forth in paragraphs III and IV, above, and each of said acts, constitute unfair labor practices within the meaning of Section 8 (a) (1) and (3), Section 8 (b) (1) (A), Section 8 (b) (2), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 13th day of July, 1954, issues this Consolidated Complaint against Olaa Sugar Company, Limited, and ILWU Local 142, the Respondents named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
Twentieth Region.

Affidavit of Service by Mail and Postal Return Receipts attached.

GENERAL COUNSEL'S EXHIBIT No. 10

[Title of Board and Cause.]

MOTION TO DISMISS FOR LACK
OF JURISDICTION

Comes now Respondent ILWU Local 142 and moves the dismissal of the Consolidated Complaint herein on the following grounds:

I.

The National Labor Relations Board is without jurisdiction of the subject-matter herein in that the charging party, Favorito P. Banez, at the time of the acts charged was not an employee as defined in § 2 (3) of the Act (29 USCA § 152 (3)) by virtue of his being an agricultural laborer.

II.

The National Labor Relations Board is forbidden by law to use funds for investigating or hearing the subject-matter herein, by virtue of the National Labor Relations Board Appropriation Act, 1953 (Title III, Act of July 31, 1953, Pub. L. 170, 83d. Congress, 1st Session) which prohibits Board funds from being used with respect to bargaining units composed of agricultural laborers, as defined in Section 2 (3) of the Act and as defined in Section 3 (f) of the Fair Labor Standards Act (29 USCA § 203 (f)).

ANSWER

By way of answer to the Consolidated Complaint herein, Respondent ILWU Local 142 shows as follows:

I.

Respondent Union is without knowledge as to the allegations contained in Paragraph I of the complaint and therefore leaves complainant to its proof thereon.

II.

With respect to the allegation contained in Paragraph II, Respondent Union states that it is a labor organization representing some employees covered under the provisions of the Act and other employees who are not so covered.

III.

Respondent Union admits the allegations contained in Paragraph III.

IV.

Respondent Union denies the allegations contained in Paragraph IV and states that Respondent Union took up the matter of the conduct of Favorito P. Banez with the Respondent Employer as a grievance under the provisions of the collective bargaining agreement.

V.

Respondent Union denies the allegations in Paragraph V and states that after having raised the grievance as set forth with the Respondent Employer, Respondent Union was informed by the Employer that the grievance was substantiated and Favorito P. Banez would be discharged.

VI.

Respondent Union denies the allegations set forth in Paragraph VI.

VII.

Respondent Union denies the allegations set forth in Paragraph VII.

VIII.

Respondent Union denies the allegations set forth in Paragraph VIII.

IX.

Respondent Union denies the allegations set forth in Paragraph IX.

X.

Respondent Union denies the allegations set forth in Paragraph X.

XI.

Respondent Union denies the allegations set forth in Paragraph XI.

Wherefore, Respondent Union prays that the complaint herein be dismissed.

Dated: Honolulu, T. H., this 22nd day of July, 1954.

ILWU LOCAL 142,
/s/ By ANTONIO RANIA,
Its President.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 11

[Title of Board and Cause.]

ANSWER OF OLAA SUGAR COMPANY,
LIMITED

Comes now Respondent, Olaa Sugar Company, Limited, and for answer to the complaint, alleges:

I.

The allegations of paragraph numbered I are admitted.

II.

The Respondent neither admits nor denies the allegations of Paragraph No. II of the complaint and demands strict proof thereof.

III.

The Respondent admits the allegations of Paragraph No. III of the complaint.

IV.

The Respondent denies the allegations of Paragraph No. IV of the complaint.

V.

Respondent denies the allegations of Paragraph No. V of the complaint.

VI.

Respondent denies the allegations of Paragraph No. VI of the complaint.

VII.

Respondent denies the allegations of Paragraph No. VII of the complaint.

VIII.

Respondent denies the allegations of Paragraph No. VIII of the complaint.

IX.

Respondent denies the allegations of Paragraph No. IX of the complaint.

X.

Respondent denies the allegations of Paragraph No. X of the complaint.

XI.

Respondent denies the allegations of Paragraph No. XI of the complaint.

Further answering the complaint, the Respond-

ent, Olaa Sugar Company, Limited, alleges Favorito P. Banez, the charging individual, was discharged with cause and without discrimination. Respondent is informed and believes and upon the basis of that information alleges that the charging individual engaged in a course of conduct intended to and with the result of disrupting harmonious working relations of the employees of the Company, and accordingly was discharged by the Employer.

OLAA SUGAR COMPANY,
LIMITED,

/s/ By J. E. EDNIE,
Its Vice-President.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 13

[Title of Board and Cause.]

MOTION TO DISMISS FOR LACK OF
JURISDICTION

Comes now Olaa Sugar Company, Limited, Respondent in the above entitled consolidated action, by its attorneys, Smith, Wild, Beebe & Cades, and moves the dismissal of the consolidated complaint filed herein for the following reasons:

I.

The National Labor Relations Board has no jurisdiction of the subject matter for the reason that

the charging employee during the times complained of was not an employee as defined in Section 2 (3) of the National Labor Relations Act as amended (29 U.S.C. Sec. 152 (3)) but was during such times and by virtue of his employment an agricultural laborer.

II.

That by virtue of the limitations placed upon the National Labor Relations Board by the Congress of the United States in appropriating funds for the operation thereof, the National Labor Relations Board has no authority in law to conduct a hearing involving an agricultural laborer as the same is defined in Section 2 (3) of the National Labor Relations Act as amended, and as defined in Section 3 (f) of the Fair Labor Standards Act (29 U.S.C. Sec. 203 (f)).

Wherefore, Respondent, Olaa Sugar Company, Limited, respectfully prays that the complaint filed herein be dismissed for lack of jurisdiction.

OLAA SUGAR COMPANY,
LIMITED,

By SMITH, WILD, BEEBE &
CADES,
Its Attorneys,

/s/ By J. EDWARD COLLINS.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

David Karasick, Esq., for the General Counsel; Edward J. Collins, Esq., of Smith, Wild, Beebe and Cades, of Honolulu, T. H., for Olaa Sugar Company, Limited, Respondent Employer; James A. King, Esq., of Bouslog and Symonds, of Honolulu, T. H., for ILWU Local 142, Respondent Union.

Before: David F. Doyle, Trial Examiner.

Statement of the Case

This proceeding brought under Section 10 (b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Hilo, Territory of Hawaii, on August 23-25, 1954, pursuant to due notice to all parties. The consolidated complaint dated July 13, 1954, issued by the General Counsel of the National Labor Relations Board and duly served on the Respondents, was based on charges duly filed by Favorito P. Banez, the charging party. It alleged in substance that: (1) the Union and the Employer, on or about October 29, 1952, executed a collective bargaining agreement which contained an unlawful discriminatory provision, and (2) on December 17, 1953, the Union caused the Employer to discharge Banez from his employment pursuant to the said discriminatory provision, and that thereby the Union had committed unfair labor practices

within the meaning of Section 8 (b) (1) (A) and 8 (b) (2), and the Employer had committed unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, as amended.

The Union, in its duly filed answer, admitted that: (1) it was a labor organization, representing both "employees," as defined in the Act, and other workers who were not covered by the same definition; and (2) on October 29, 1952, the Employer and the Union had executed a contract containing a provision which shall be hereafter set forth, and denied the commission of any unfair labor practices. The answer of the Union also stated that the Union lawfully presented to the Employer a grievance, based on the conduct of Banez, under the provisions of the collective bargaining agreement, and that thereafter the Employer notified the Union that the merits of the grievance had been substantiated, and that thereafter Banez was discharged. It was also the position of the Union, as stated at the hearing, that the alleged discriminatory provision of the contract was not discriminatory or unlawful.

The Employer in its duly filed answer admitted: (1) certain allegations of the complaint setting forth facts of its business operations, and (2) that the Employer and the Union had executed the collective bargaining agreement containing the particular provision above referred to, and denied the commission of any unfair labor practices. The answer of the Employer also alleged, as an affirmative defense, that Banez was discharged without dis-

crimination and for cause, because he engaged in a course of conduct intended to, and resulting in, the disrupting of the harmonious working relations of the employees and the Company, "and that based upon such conduct, considered in the light of the work record of the complainant, and the effect of such conduct upon the operations of the Respondent, the complainant was discharged by the Employer." ¹

All parties were represented at the hearing, were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and proposed findings. Brief oral arguments were presented by counsel and all waived the filing of briefs.

Motion to Dismiss

At the opening of the hearing, and at the close thereof, both the Employer and the Union moved to dismiss the complaint on the ground that the Board was without jurisdiction of the subject matter, or the persons involved, because (1) the charging party, Banez, at the time of the acts alleged in the complaint, was not an "employee," as defined in the Act, being an agricultural laborer, and (2) the Board was forbidden to use funds for investigating or hearing the subject matter, by the terms of the

¹ The answer of the Employer was amended at the hearing to include the quoted allegation.

Board's Appropriation Acts.² The motions are based on the following sequence of legislative enactments.

Section 2 (3) of the National Labor Relations Act excluded from the definition of the term employee, "any individual employed as an agricultural laborer." Annually since 1946 Congress has added a rider to the appropriation for the Board, providing that no part of the appropriation, "shall be * * * used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in * * * Section 3 (f)" of the Fair Labor Standards Act (29 U.S.C.A. 203 (f)). The last mentioned section, so far as here pertinent, reads as follows:

* * * "agriculture" includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market or to carriers for transportation to market.

When the motion was made at the opening of the hearing it was denied, with leave to renew, on the ground that, at that time, there was no factual basis for the motion. The Trial Examiner suggested that

² National Labor Relations Board Appropriation Act, 1954 (Title III, Act of July 31, 1953, Pub. L. 170, 83d Congress, 1st Session) and National Labor Relations Board Appropriation Act, 1955 (Title III, Act of July 2, 1954, Pub. L. 472, 83rd Congress, 2d Session).

counsel present evidence on both the issue raised by the motions, and the issues raised by the pleadings, thus affording the Board an opportunity of making a final disposition of all issues in the one proceeding. This suggestion was accepted by counsel, and thereafter evidence was presented and received on the issue raised by the motions, and those raised by the pleadings. At the close of the evidence, the Union and the Employer each renewed its motion to dismiss on the grounds previously stated. The Trial Examiner reserved ruling, stating that he would dispose of the motion in the course of his Intermediate Report, after an examination and consideration of the authorities, submitted by counsel, in the course of their argument. The motion is hereinafter denied.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The labor organization

Upon the pleadings, the evidence as a whole, and the Board's Decision and Direction of Election in the proceeding entitled Matter of Pepeekeo Sugar Company, et al., and International Longshoremen's and Warehousemen's Union, Local 142, et al., 59 NLRB 1532, dated January 12, 1945, of which I take judicial notice, I find that ILWU, Local 142, is a labor organization within the meaning of Section 2 (5) of the Act.

At the hearing it was stipulated by the parties,

that as a result of the above-named proceeding, in which both the instant Union and the instant Employer were parties, the Union on March 22, 1945, was certified by the Board as the collective bargaining representative of certain of the "employees" of the Employer, and that since that date the Union and the Employer have engaged in collective bargaining, and have been in contractual relationship with respect to various employees and workers of the Company at its operations located at Olaa, Island of Hawaii, T. H.

However, it is clear that for some time past the Union, in addition to representing "employees," has also represented "agricultural" workers employed by the Company. The General Counsel introduced into evidence the current labor agreement between the parties, which was effective September 1, 1951, and amended October 29, 1952.³ Section 3 of this contract, entitled "Employee Coverage," states that the employees covered by the agreement are: "All production, maintenance and agricultural employees of the Company with the exception" of workers in certain categories specifically excluded. The section then sets forth four units of employees represented by the Union. It should be noted that Unit 3 brings within the operation of the contract some agricultural workers, whose positions had been considered by the Board in the Pepeekeo Sugar case, *supra*, and had been specifically excluded from the certification granted to the Union, on the ground

³ General Counsel Exhibit No. 14.

that they were agricultural workers. The Board found that the employees of the sugar companies engaged in the following operations, in addition to certain dairy workers, were agricultural laborers within the meaning of the Act:

(1) Preparation of the land for planting, cultivating, fertilizing, irrigating, harvesting, including the loading by hand or by crane of the cut cane onto the initial means of transporting the cane from the fields, and the care of animals.

The contract, by its terms, covers these agricultural workers in nearly identical language. Section 3 (c) reads as follows:

Unit 3. Those agricultural employees of the Company who are engaged in clearing and preparation of land, preparation and transportation of seed, planting, cultivating, irrigating, fertilizing, spraying with herbicides and insecticides, harvesting, including the loading of the agricultural products onto the initial means of transporting them from the fields, and the care of animals used in cultivating and harvesting; and also employees in ranch and dairy operations, except employees in the milk room on dairy ranches and employees engaged in milk delivery * * *

The contract, by its terms, also covers a category of employees whose employment was found by the Board to be within the definition of employee, although they spent part of their time in agricultural pursuits.

It should also be noted that in the Papeekeeo decision, *supra*, workers engaged in transportation were

found to be "employees" within the definition of the Act. Banez, the complainant herein, at the time of his discharge was, and for some time prior thereto, had been a senior cane truck driver, so there is no question of his personal status as an "employee" under the Act, unless his status within a group has been changed by virtue of the Appropriation Acts, as contended by the Respondents.

The fact that a union undertakes to represent both employees and agricultural workers does not place the union outside the operation of the Act.⁴

II. The business operations of the Employer. Evidence relating to the motion to dismiss.

It was stipulated by counsel that Olaa Sugar Company, Limited, is an Hawaiian corporation which is engaged in the growing and processing of sugar cane on the Island of Hawaii, Territory of Hawaii. The Company owns and cultivates 7,418 acres of cane fields on the Island of Hawaii, and also purchases sugar cane from a number of independent growers whose 6,911 acres of cane fields are also located on the Island of Hawaii. The Employer produces raw sugar and molasses annually in excess of a value of \$6,000,000, which is shipped to points outside the Territory of Hawaii from the Employer's sugar mill located at Olaa, Island of Hawaii.

The nature of the relationship between the Employer and the independent growers is established by a series of agreements introduced in evidence by

⁴ Di Giorgio Wine Company, 87 NLRB 720.

the General Counsel.⁵ These agreements are typical contracts of sale, by which the independent grower agrees to sell and the Employer agrees to buy the sugar cane grown by the grower on certain lands specified in the contract. The contracts contain provisions as to weight of sugar cane, basis of price, quality factor correction, rate of payment, accounting and settlement, etc. The sections of the various contracts which are of importance in the instant proceeding are those relating to the delivery of sugar cane, or the passing of title thereto. In the Independent Grower Agreement,⁶ it is stated that the mill (the Employer) "will take delivery of the crop or crops of sugar cane now growing or to be grown * * * cut and piled by the Grower (or cut and piled by the mill at his request and expense) on slings within 300 feet of a passable road * * * all at the time or times designated by the mill feasibly nearest to the time of maturity of said crop." The Temporary Amendment⁷ to the independent grower agreement, Section 2 thereof, states that "the mill (the Employer) will take delivery of the crop * * * now grown or to be grown during the term hereof, cut and piled by the grower on slings within 300 feet of a passable road * * * all at the time or times designated by the mill feasibly nearest to the time of maturity of said crop or crops." It further provides that, "should the mill undertake to perform the harvesting operations required of the grower, at

⁵ General Counsel Exhibit No. 17A, 17B, 17C, 17D.

⁶ General Counsel Exhibit No. 17A.

⁷ General Counsel Exhibit No. 17B.

the request of the said grower, then the mill shall have the right in its sole discretion to determine the method whereby the said operations shall be performed, either by hand cutting and piling as described herein * * * or alternatively by such mechanical methods as the mill may select * * * and delivery of said sugar cane shall be taken by the mill at the point of severance from the ground of the said crop or crops at time of harvest, and subsequent loading and transporting operations shall be performed by the mill at its expense by any methods compatible with the selected method of mechanical harvesting." This same document in Section 10 states that the grower will grow and care for the crop, planting or replanting, with only such varieties of sugar cane as the mill may approve, all in accordance with the methods of good husbandry as practiced in the surrounding area; and that the grower will cut and pile his crop on his land upon slings (to be furnished by the mill) in bundles of specified size within 300 feet of a passable road for delivery to the mill at the time or times scheduled by the mill.

The tenor of all the agreements is that the independent growers shall have exclusive control of the planting, cultivation and harvesting of their crop, and its delivery at a point within 300 feet of a roadway, where it can be picked up by the Employer. The gist of all the agreements appears to be, that when the grower has raised his crop, cut it, and placed it in bundles of specified sizes, upon the slings furnished by the employer, at a place within

300 feet of a passable roadway, he has fulfilled his contract, and at that time and place delivery of the sugar cane is deemed complete.

Caleb E. S. Burns, Jr., manager of the Employer, testified credibly, furnishing further details as to the operations of the Company. He testified that the sugar cane fields of the independent growers are contiguous to the sugar cane fields of the Company. There are 438 independent growers, who cultivate 6,911 acres, and who furnish sugar cane to the Company's mill located at Olaa. The same mill also processes the sugar cane from the Company's own acreage amounting to 7,418 acres.

Burns testified that the relationship of the growers to the Company dated back to the start of the Company in the early 1900's. At that time the Company encouraged its employees to grow sugar cane on the side as a means to aiding them to increase their own income, and also to give the Company more sugar cane for its milling and processing operations. The relationship between the growers and the Company changed during the years. During the period 1935 to about 1951, the growers who had a relationship with a sugar milling company, were classified as "adherent planters," a term used in the Sugar Act of those years. In early 1951, their status was changed from that of adherent planter to one of "independent grower." Under that change, the grower actually assumed more of the responsibilities of being an independent farmer, which is the relationship existing at the present time. Under the

terms of the Company's present agreement with each independent grower, the Company takes possession of the cane in the field. There are two types of contract, one mechanical, in which the Company takes possession of the cane at the moment the cane stalks are severed from the ground, and the hand harvesting contract in which the Company takes possession of the cane after it has been cut and piled in the field. During the period of the adherent planter relationship, one of the regulations of the Sugar Act prohibited a company from changing the ratio of administration, or company land, to that of adherent planters cane land; thus a sugar company was prohibited from increasing its area under cultivation to the exclusion or detriment of the adherent planters. The sugar companies were compelled to adhere to that arrangement, if they were to obtain benefit payments allowed under the terms of the Sugar Act. At the present time, under the independent status of the growers, the same rule does not apply, but the land which a company owns and leases to growers, cannot be taken back by the company and put into cultivation for the company's purposes, during the term of the company's lease with the independent grower. A harvesting schedule for both the company's fields and the independent growers' fields is formulated each year by the company on the basis of age of crop. The company attempts to keep its age of harvest at about 24 months, so fields that were harvested in 1951 in a particular order will probably be harvested again in 1953 in the same order. This scheduling, based on

the age of crop, applies alike to the fields of both independent growers and the company.

In 1953 the Company was engaged in hand harvesting exclusively. In that operation the cane is cut by hand by workers and gathered into piles of specified sizes, on cable slings. Each pile weighs approximately $1\frac{1}{4}$ ton. When the slings are hooked together the pile becomes a bundle, which is then lifted from the ground by a traveling crane, and loaded into trucks for transportation to the sugar mill. Olaa Sugar Company has about 340 plus miles of roadway on its own land, and about 106 miles of roadway which is on independent growers' acreage, over which the Company also has a right of way, or a total of about 450 miles of private roadway in the 14,300 acres of cane land. All of the cane is loaded on plantation field roads; none of it on public highways. However, a network of public roads connects the various large sections of fields with each other, and with the sugar mill at Olaa, and these public roads are used by Company's trucks, when more convenient, and when necessary.

Burns testified that on Exhibit No. 2A the only Company road shown was the old railroad bed which became a private road with the removal of the railroad tracks, but that the public roads through the area were marked in dark blue lines. On Map 3 the public roads are shown as well as the plantation roads. Examination of the maps discloses that the public highway system is the primary means of transportation between the various sections of the

Company's lands and the sugar mill, and are the only hard surface roads in the entire area.

The Company's mill is located close to Olaa village (shown on Exhibit No. 2A). The longest haul is from Kanaili, Malama, to the mill, a distance of approximately 23 miles. It is also approximately 12 or 14 miles from the Pahoa area to the mill.

On cross-examination Burns testified credibly that there are 170 people employed at the mill, in factory operations and associated service operations. A value of between 6 to 7 million dollars was placed on the mill by an insurance company in a recent appraisal. The original cost of the mill on the books of the Company is \$1,200,000. The Company's production of sugar in 1953 amounted to 55,967 tons of 96° sugar. Olaa stands sixth among the sugar mills in the Hawaiian Islands rated on the basis of total production. Burns also said that the usual term of the Company leases to independent growers is 15 years, and that of the 6900 acres of independent growers' land, approximately 2500 acres was Company owned; the balance was owned outright by the independent growers. The Company usually made contracts for sugar cane with the independent growers on a crop-to-crop basis. The independent grower paid for the seed cane and was responsible for all irrigation and cultivation necessary to bring the crop to maturity. As to harvesting there were two types of arrangement, one by which the Company performed the harvesting at the expense of the independent grower, and another where the grower performed the harvesting. In 1953 the only harvest-

ing performed was by hand, the Company performing the work, and the grower paying for the cutting and piling. The entire cost of harvesting an independent grower's cane was borne by the grower, but the labor was furnished by the Company through its own labor force, which consisted of cane cutters. After the cane was cut, its transportation to the mill was the responsibility of the Company alone. The Company fields and the independent grower fields are intermingled. The average holding of independent growers varies from an acre to 200 acres, but the average is approximately 12-15 acres. All terms of the contract between the independent growers and the sugar companies are under the supervision of the Department of Agriculture.

George Mair, the harvesting superintendent of the Employer, testified credibly, giving a clear description of harvesting operations. He also described the work of the cane truck drivers. He said that the hand-harvesting operation at Olaa in 1953 was subdivided into three sections—Mountain View, Olaa, and Puna. Each of these sections was under the supervision of a harvesting overseer, each of whom had approximately 4 - 5 gangs of cane cutters, approximately 130 men, under him. In the morning the men were taken to the fields of matured cane, which had been burned the previous day, and each was assigned five lines of cane, which are 5 feet apart, to cut. Slings were distributed to the men, and each one dragged a sling to his assigned place. As he cut the cane into piles of $1\frac{1}{4}$ ton, the cut cane was piled on the slings. A traveling crane

which moved along the field, then picked up the piles of cane, and deposited them into the trucks, or trains, for transportation to the mill. It was one of these trucks which Banez, as a senior cane truck driver, operated at the time of his discharge. In the 1953 harvest the Company operated 15 White gasoline trucks and 6 GMC diesel trucks. He said he was not sure of the horsepower of these trucks, but he explained that the equipment as used, and as driven by the senior cane truck drivers, consisted of a tractor-truck to which was attached a semi-trailer, and full trailer. This equipment comprised a "train" which was 64 feet long over-all, and rolled on 26 wheels over-all. The frames of the semi-trailer and full trailer were approximately 12 feet high and 8 feet wide. Each of such trains carried a load of approximately 16-18 piles of cane, making a payload of approximately 22 tons. The same equipment was used on both the public highways and private roads of the Company. The field roads are one-way roads, while the public roads are two-way.

Mair stated that the central point of all trucking operation was the mill, from which the trucks were dispatched and their operations controlled by a dispatcher who directed operations by means of radio-telephone. He explained that when a truck left the dispatcher's shack at the mill, the time was noted. When it reached the field, the loading foreman on the traveling crane, who has a radio-telephone in the cab of the crane, reported the truck's arrival by number. Thereafter, he notified the dispatcher when loading of the truck was begun, when the loading

was completed, and when the truck left the field for the mill. The truck dispatcher recorded the time and each movement of each truck in his log. A trip from the mill to the farthest point in the Company's fields, and return to the mill, took 2½ to 3 hours. In general, the trucks were routed via Company roads where the cane was cut, to the nearest public highway, and thence over the public highway to the mill. The Company roads ran through the cane fields at intervals of 500 feet, and were one-lane, dirt roads. The trucks went in on one road and out by another. The cane from some fields near the mill, and from other fields which could be reached via the old railway bed, could be transported to the mill by using Company roads alone, but the general practice was to use the two-lane, hard-surfaced public roads where practicable.

In December 1953 the Employer had 33 truck drivers, all under the dispatcher who supervised truck drivers only, except for a small crew who took tare samples of the sugar cane.

Mair testified that on an annual basis, truck drivers spent approximately 50-60 percent of their time on public highways and 40-50 percent on Company roads. He also said that all loading and unloading was performed exclusively on Company property, and not on the public highway, and that during loading and unloading the truck drivers had no duties except to stay with their truck, move it as required, and chop off any cane stalks protruding from the vehicles. In 1953 the Company operated 19 trains, approximately 11 on each shift, three 8-hour

shifts per day. He explained that a day shift of cane-cutters could cut sufficient cane to keep truck drivers busily engaged for three shifts. During 11 months of the year cane cutting, and transportation, continued at that same steady rate. One month each year was devoted to an overhaul of equipment. During that month truck drivers worked on trucks at the Company's garage.

The transportation of the cut cane from the fields of independent growers, and from the fields of the Employer, are accomplished by the same force of truck drivers, the same trucking equipment, and by the same methods of dispatch. The truck drivers spend about half their time hauling cane from the Company's fields, and half their time from the independent growers' fields.

Mair said that senior cane truck drivers did not operate anything but cane trucks. Jobs in this classification were filled by posting, and selection by the Company on the basis of ability, with due consideration being given to seniority, and all other relevant factors. The General Counsel introduced in evidence the job description for senior cane truck drivers as prepared by the Company. Mair testified that the job description was originally prepared by the control dispatcher, checked with the Industrial Relations Department, and then by himself, as the head of the department. This job description specifies the abilities, and duties of senior cane truck drivers in minute detail. It is especially noteworthy for two reasons: (1) the numerous duties there detailed relate to truck driving only, there is no prescribed

conduct therein that could possibly be classified as an "agricultural" task; (2) a condition precedent to occupying the position is the possession of a County of Hawaii vehicle operator's license.⁸

III. The unfair labor practices

A. Background.

There is no substantial conflict in the testimony as to the events which culminated in the discharge of Banez on December 17, 1953. It is undisputed that the contract between the parties, in effect at all times pertinent hereto, contained in Section 1, entitled Recognition and Union Security the following paragraph:

Any claim by the Union that action on the job of a non-union employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruption of harmonious working relations shall be grounds for discipline or discharge. (Emphasis supplied.)

The background of the employment of Banez is likewise undisputed. His Employee Service Record⁹ discloses that he was born in the Philippine Islands in 1918, completed 11 grades at English-speaking schools in those islands, and entered the Territory of Hawaii in 1946. He is married and has one child. He began his employment with the Company in February 1946 as a cane cutter, and continued in its employ until his discharge. His first rate of pay,

⁸ General Counsel's Exhibit No. 5.

⁹ Employer Exhibits Nos. 8-A and B.

shown by his record, was 74 cents per hour. In his 7 years' service with the Company he occupied twenty various positions in milling, field, and transportation. Each change of position, apparently, was accompanied by an increase in his rate of pay, except in two, of the 20 changes enumerated in his record. The principal positions which he held successively: cane cutter, 74 cents per hour; centrifugal operator, 78 cents per hour; fingerlift operator, 81, 86, and 92 cents per hour; utility electrician trainee, 80, 83, and 94 cents per hour; field transportation handyman, 94 cents per hour; and his last position, senior cane truck driver at a rate of pay of \$1.17 per hour, which was raised to \$1.28 per hour on September 1, 1952. He continued as a senior cane truck driver at that rate of pay until December 17, 1953, when he was discharged, as hereafter related. The nature of the changes in Banez' employment were noted on his service record, which summarized, shows that from February 4, 1946, to December 17, 1953, he was: transferred on seven occasions; reduced on one occasion, in October 1948; and transferred-reduced on one occasion, on November 26, 1951; and upgraded on ten occasions—the last upgrading, being dated August 7, 1952, to senior cane truck driver, his last position.

When Banez began his employment with the Company he became a member of the Union and continued in membership until the latter part of 1951. During the years of his membership he authorized a checkoff of his dues by the Company. He did not authorize a checkoff for the year 1952, and he did

not pay any dues thereafter. Banez stated that thereafter he was not a member of the Union, and it was stipulated by the parties that at the conference of October 19, 1953, which will be hereafter described, the Union represented to the Company that Banez was not at that time a member, and had not been a member for some months prior thereto.

It is likewise undisputed, that for many months prior to the discharge of Banez, the Company had been planning the mechanization of its field operations. The introduction of mechanical equipment for the cutting of sugar cane, would result in a large reduction in the number of cane cutters employed by the Company. Company officials expected to cut the work force from its normal complement of 1100 employees to 540 employees, with the installation of the mechanical equipment in December 1953. They were apprehensive of labor trouble occasioned by the reduction in force, and were especially apprehensive of the reaction of the Filipino employees, who to a very large extent made up the field force, and who would receive 75 percent of the planned reduction. Desiring to effect the reduction with a minimum of friction, Company officials discussed the situation with the representatives of the Union, and it was agreed that the reduction in force would be based on seniority and ability to do the work. A short time after this first arrangement was made, the Union asked that certain employees with large families who would be disqualified on the basis of seniority and ability, be retained on the

payroll as "hardship cases." The Company agreed to consider the proposed hardship cases, and vary the general bases, where warranted by the circumstances. It is against this background that the discharge of Banez was accomplished.

B. The conference of October 19, 1953.¹⁰

Francisco Latore, who in 1953 was the second vice president of the Union, testified that about August 10, two men, named Dela and Revera, came to his home and showed him a petition. He told the men that they should get permission to circulate a petition from the executive board of the Union. He asked them what the petition was for. They were reluctant to answer, but upon further questioning said that they wished to call a general membership meeting of the Union to clear up some misunderstanding between the rank and file and the Japanese officers of the Union. He took the men to a meeting of the executive board, but they refused to tell the board the purpose of the petition. On the following day, he learned that Banez also was circulating a petition. The executive board of the Union designated him to investigate the activities of the three men and to report, which he did. As a result of his report, the executive board requested a conference with Company officials. On October 19, the conference was held.

At this conference, the Company was represented

¹⁰ All dates in this section of the report are in 1953 unless otherwise noted.

by Nelson L. West, Assistant Manager; Myron O. Isherwood, Director of Industrial Relations; and Caleb S. Burns, Jr., Manager of the Company, previously referred to. The Union was represented by the members of its grievance committee, about 20 in number, including employees Latore, Kinji, Omuri, Shirasaki, Inaga, Arakaki, and Fred Low, a business agent of the Union, not an employee of the Company. All the Company representatives testified as to the events of this conference, as did Latore and Arakaki. These witnesses were in agreement as to the substance of the conference.

To start the meeting off, Burns asked who would be the spokesman for the Union. Latore answered that he would, and thereafter Latore and Arakaki acted as spokesmen. Latore told the Company representatives that three men, Dela, Revera, and Banez, were engaged in circulating petitions, a copy of which he had not been able to obtain, but which was critical of the union officers, who belonged to the Japanese nationality group. He said that Banez had made remarks to the effect that the officers of the Union, being of Japanese extraction, had favored the Japanese employees in the proposed lay-offs, and in job opportunities, to the detriment of Filipino employees. The spokesmen for the Union then called upon various members of the Union who were present to tell of various incidents showing improper conduct by Banez in the course of his employment. Evidently these incidents covered hitherto un-noticed delinquencies of Banez in his various jobs, and derogatory remarks made by him

about the union officers. The union representatives said that the activity of the three men had fostered racial or national antagonism between the Japanese officers of the Union, and the Japanese employees on one side, and the Filipino employees on the other.¹¹ Dela and Revera were union members, so the Union felt that it could take care of those individuals. However, as to Banez, the Union took the position that his conduct constituted a violation of Section 1 of the contract, in that his activity disrupted the harmonious working relations existing between the Employer and the Union, and the Union demanded that the Company take action against Banez pursuant to that section of the contract. The Company representatives told the Union that they were very much concerned with any racial or national antagonism, and that they would check into the matter. Burns also assured the Union that the policy of the Company was not to consider national or racial matters in regard to layoffs, promotions, or job opportunities.

In his testimony, Latore said that he told the Company that Banez had been circulating petitions, and had been seeing too many stewards, saying that

¹¹ It should be understood that any reference in this report to the "Japanese" or "Filipino" employees merely adopts the language of the witnesses. Such was their manner of reference. There was no evidence as to the citizenship of any of these people. I presume they are all Americans, by either birth or naturalization, so the terms are descriptive of ancestry, or place of birth only.

the Japanese are looking out for their nationality alone, and the Filipinos were being deprived of opportunities for promotions and jobs. He also said that he learned from other employees that the substance of Banez' petition was that some of the Filipino employees were dissatisfied with some conditions, and they wanted a general meeting of the Union to clarify some of these misunderstandings. The Union officers felt there were regular channels for bringing up such matters, and that the petition was not the proper procedure. When Latore was questioned closely as to what request the Union made to the Company in regard to Banez, he answered, "We just told the Company to act upon this grievance; either transfer him, or kick him out of the Company. It is not our business."¹² A question or two later, he said that the Union asked the Company to take "disciplinary or discharge" action, using the terminology of Section I. A little later he was asked, "You couldn't fire him yourself, but you were asking the Company to do this weren't you? Isn't that right?" His answer was "Yes."

The officials of the Company who were present at the meeting stated that the tenor of the Union's grievance was that the Union demanded that the Company take action against Banez pursuant to Section 1 of the contract, although none of the Union representatives requested or demanded that Banez be fired in so many words.

¹² Transcript, page 204, et seq.

C. The discharge of Banez.

On December 17, 1953, Burns, the manager of the Employer, sent the following letter to Banez:

Dear Sir:

This will be notice to you that your services will no longer be required by Olaa Sugar Co., Ltd., on and after December 17, 1953.

This action is taken as a result of your actions in violation of Section 1 (Recognition and Union Security) of the agreement between Olaa Sugar Co. Ltd. and the United Sugar Workers, ILWU, Local 142, as brought to our attention by the union.

Yours truly,¹³

On January 7, 1954, Burns sent the following letter to Banez in explanation of the prior letter:

Dear Sir:

The reason for your discharge, as of December 17, 1953, was as stated in our letter of December 17, 1953 — violation of Section 1 (Recognition and Union Security) of the agreement between this Company and the United Sugar Workers, ILWU, Local 142, as brought to our attention by the union.

The details of this violation, as presented to us by the union, were explained to you at the time of your meeting with Assistant Manager West on December 23, 1953.

Very truly yours,¹⁴

Apparently the first official notice that Banez had that his conduct had evoked action by either the

¹³ General Counsel Exhibit No. 15.

¹⁴ General Counsel Exhibit No. 16.

Union or the Company was received by him in the Company's discharge letter of December 17. Before receipt of this letter, neither the Company nor the Union warned him of the pending action against him, or afforded him an opportunity to defend himself.

As mentioned in the letter of January 7, 1954, he was afforded some information relative to his discharge by Assistant Manager West in an interview which occurred on December 23, 1953. Both Banez and West testified credibly, giving almost identical accounts of what each said in this interview.

West's version of the interview made crystal clear the motivation of the Company in the discharge of Banez. It is quoted verbatim:¹⁵

Mr. Banez came to see me. He originally asked for a meeting with Mr. Burns. Mr. Burns was in Honolulu at the time that Mr. Banez wanted to see him, and he asked me to interview Banez in his stead. Mr. Banez came to my office, it was in the afternoon if I recollect right, and asked me why he was discharged. I told Mr. Banez that the Union had filed or had brought up a grievance to the Company and we had held at their request a meeting, that there were some 20 odd members present at this meeting, and they had brought out at this meeting that he — Banez — was disrupting harmonious relationships with the Company, by circulating a petition against the officers of the Union, and was

¹⁵ Transcript, page 428.

fostering racial discontent among the Filipinos, claiming the Japanese were getting all the breaks in this layoff procedure that we were in the middle of.

I also told Mr. Banez that his work record at Olaa had been very poor. And Mr. Banez reviewed his long disagreement with the Union over many issues which he brought out, such as the union shop, claiming that the union officers were out to get him, and had brought this action against him for that reason. I told him that it was no concern to the Company what the internal affairs of the Union were and we were not interested in it, but we were sincerely disturbed by this charge of racial, stirring up of racial discontent.

Mr. Banez asked me what he could do in regard to this discharge. I told him that the steps of the grievance procedure were open to him. I also told him that if he took the grievance procedure to its final conclusion, which would be arbitration, that he could not possibly expect the Union to pay for the cost of the arbitration since they had brought these charges against him, and that it would cost him, would be of some cost to him to take this matter to arbitration.

Mr. Banez asked me whether there was any charges made by other than the officers. I told him that there were approximately 20 people there and that various members of this union committee had stood up and given testimony in regard to his actions. That testimony was covered by Mr. Isherwood in his testimony and is correct as he gave it.

I also told Mr. Banez that if he took this matter through arbitration and was successful in regaining employment with the Company, that he would still have to live with the people on the plantation there, and giving him a little advice I said that he would probably be happier if he didn't spend this money to go to arbitration and maybe attempted to find employment elsewhere.

Mr. Banez agreed with me, said that he wanted to stay and fight the Union, bringing up other matters such, as he put it, communist-led union; that they were out to get him and he was there, was going to stay there, and fight this matter to a final conclusion. I think in general that is the gist of the meeting.

It should be noted that in the above testimony, West referred to the "poor work record" of Banez. His reference is in line with much more detailed testimony by Manager Burns, who testified that as a result of the conference of October 19, he asked for and received Banez' complete work record. He assessed the record as poor, and considering the Union's complaint "in the light of his poor work record," he decided to discharge Banez. It was the injection of the factor of Banez' work record into the case, to which the General Counsel promptly objected, that resulted in the amendment of the Employer's answer, as previously noted. To substantiate Burns' testimony as to Banez' poor work record, the Employer introduced records pertaining to three disciplinary layoffs, and three reprimands

given Banez in the course of his 7 years' employment.¹⁶

Giving due consideration to the undisputed evidence in the case, I am not persuaded that the work record of Banez played any part in influencing Burns to a decision to discharge Banez. On the contrary, I am satisfied that the feature of Banez' work record is merely a pretext, belatedly thought of, and seized upon, by the Company in an effort to exculpate itself. The testimony of the Company officials on this point, as given from the witness stand, lacked persuasive quality, and stands refuted by other undisputed evidence in the case. The Company's discharge letter given to Banez on December 17, and the Company's letter of explanation of the discharge given Banez on January 7, 1954, state in unequivocal language that Banez was discharged because of his "violation of Section I . . . of the agreement." Furthermore, Banez was a senior truck driver at the time of his discharge, and all his delinquencies were in the remote past. It is conceded that he had been punished by disciplinary action for each of his past infractions of Company rules, and that for some months prior to his discharge he had been charged with no new infractions or delinquencies, save that charged by the Union. At the time of his discharge Banez stood in the same position as any other employee previously reprimanded—that of one whose record was less than

¹⁶ Employer's Exhibits 7A, B, C, D, E, F.

perfect, but good enough to be retained in employment.

One further fact should be mentioned. Burns testified, and it is undisputed, that as far as he knew Dela and Revera was still employed by the Company.

Concluding Findings

Upon the credible evidence, I find that on October 19, 1953, the Union requested the Employer to take disciplinary action against or to discharge Banez, pursuant to Section I, eighth paragraph, of the contract between those parties, and that on December 17, 1953, the Employer complied with the request by discharging Banez. I specifically find that Banez was not discharged because of his poor work record, or for cause.

That the above-mentioned section of the contract is discriminatory as alleged by the General Counsel, is patent, from the disparate treatment afforded Banez, a nonunion man, on the one hand, and that accorded Dela and Revera, union members, on the other. By its terms, the provision confers on the Union the right to initiate the disciplining or the discharge of nonunion employees of the Company. It has no such right in regard to its own members. The provision is an instrument of obvious purpose, by which the employees who refrain from joining the Union are made, none the less, subservient to it. In the instant case, Banez, one of the nonunion employees, felt that his particular group had not been treated fairly in the arrangements for job redistribution made by the Union with the Com-

pany. He exercised his right of free speech to criticise the arrangement, and the employee representatives who had made the arrangement, and sought by the circulation of a petition to enlist the support of others who shared his views. In this conduct he exercised his fundamental right of free speech guaranteed to him by the Constitution, above and beyond the guarantees of the same right vouchsafed him by the National Labor-Management Act. However, the officers of this Union sought by the provision in question to deprive him of this right, and force him to accept in silence, what they gave him, regardless of whether it was fair or not. With the merits, or the truth of Banez' criticism, we are not here concerned, but we are concerned with his right to voice his criticism. It may be that his criticism of the union officers was entirely unjustified, but they must suffer the criticism as one of the unpleasant features of office, and reply by words or conduct that deny or disprove the criticism; they may not silence their critic by force, the forfeiture of his property, or by the forfeiture of his job by which he lives, and supports his family. The evidence establishes, beyond doubt, that the union officers caused the Employer to effect just such a forfeiture. And the Employer's conduct is no less reprehensible. It may have been apprehensive of dissatisfaction among the employees occasioned by the reduction in force, and made what to them seemed to be an expedient arrangement with the Union as to how the reduction would be effected, but that is no excuse for the Employer's violation of Banez' rights.

Although, inherent in the Union's complaint about Banez, the nonunion employee, was knowledge of similar conduct by Revera and Dela, the union employees, and although on its face Section I of the contract discriminated between union and nonunion employees, yet the Company weakly submitted to the Union's discriminatory demand, discharged Banez, and continued the employment of the union employees. That this discriminatory provision of **the contract** and the conduct of the Union and the Employer are unlawful, is clear from the recent decision of the Supreme Court in *Radio Officers' Union v. N.L.R.B.*, 347 U. S. 17.

Mr. Justice Reed, in the opinion of the Court, has the following to say in regard to the prohibitions of the Act against discrimination in the hire and tenure of employees by employers or by unions:

... The policy of the Act is to insulate employees' jobs from their organizational rights.⁴⁰ Thus Sections 8 (a) (3) and 8 (b) (2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to Section 8 (a) (3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the

⁴⁰ See Section 7, 29 U.S.C. (Supp. V) Section 157, note 13, *supra*.

same terms and conditions generally applicable to other members” or if “membership was denied or terminated for reasons other than failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.”⁴¹ Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination.⁴² This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel

⁴¹ The full text of the proviso to Section 8 (a) (3) is set out in note 1, *supra*. That congress intended section 8 (a) (3) to proscribe all discrimination to encourage union membership not accepted by the proviso see H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44, where it is stated that Section (8) (a) (3) “prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, except to the extent he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract.”

⁴² Under the Wagner Act the proviso read: “Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in said sections as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.” 29 U.S.C. Section 158 (3). See *Colgate-Palmolive-Peet Co. v. Labor Board*, 338 U. S. 355 [25 LRRM 2095].

payment of union dues and fees. Thus Congress recognized the validity of unions, concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.⁴³ Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership or stay in good standing in a union is condoned.⁴⁴ (Emphasis in above supplied.)

⁴³ For example, Senator Taft said: "It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation." 93 Cong. Rec. 4191.

In H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 33, it was stated that "The bill prohibits what is commonly known as the closed shop, or any form of compulsory unionism that requires a person to be a member of a union in good standing when the employer hires him."

See also 93 Cong. Rec. 4135, 4193, 4272, 4275, 4432; S. Rep. No. 105, 80th Cong., 1st Sess. 6 et seq.; H. R. 3020, 80th Cong., 1st Sess., 27-28; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41.

⁴⁴ See *Labor Board v. Eclipse Lumber Co.*, 199 F. 2d 684 [31 LRRM 2065]; *Union Starch & Refining Co. v. Labor Board*, 186 F. 2d 1008 [27 LRRM 2342].

* * * *

Therefore, I find that the Employer has violated Section 8 (a) (1) and (3), and the Union Section 8 (b) (1) (A) and Section 8 (b) (2) of the amended Act, as alleged in the complaint.

The Motion to Dismiss

In the motions to dismiss, the Respondents rely principally upon two recent decisions, one by the Board¹⁷ and the other by the Court of Appeals, Ninth Circuit.¹⁸

From an over-all consideration of his duties, it would appear that Banez, as a senior cane truck driver was not an agricultural worker. The description of that job furnished by the Employer, which is the only evidence of that nature, establishes that all his time is spent driving a truck-tractor, to which are coupled a full trailer and a semi-trailer. These vehicles form a "train" of considerable proportions, which must require skillful operation. From the job description, and the testimony of Mair, it would appear that Banez spent 100 percent of his time driving this vehicle, except for one month each year, when equipment was overhauled, when he worked on the trucks at the garage. He did not at any time lend a hand to any agricultural operation.

¹⁷ Clinton Foods, Inc., 108 NLRB No. 16, 33 LRRM 1481.

¹⁸ Waialua Agricultural Company, Limited, et al., 216 F. 2d 466, certiorari granted U. S. Supreme Court.

According to Mair's testimony, Banez drove his vehicles on the public highways over half the time. While the maps may indicate a larger proportion of private roads in the area than public roads, that disproportion is deceptive. The Company has roads or lanes, one-vehicle wide, through the cane fields at intervals of approximately 500 feet. The total mileage of these one-way dirt roads is a substantial figure, but it should be borne in mind that Mair testified that the usual manner of operation was to route the vehicles over the public highways, then into the fields via the private lanes, and to bring them out by the shortest route to the highway, and thence to the mill. When it is considered also, that loading and unloading occurred on Company property, and that such time was included in time spent on Company property, although the driver merely awaited completion of the operation, it would appear that most of Banez' duties as a driver were performed on the public highway.

Banez and the other drivers hauled the cane of independent growers to the mill, in addition to cane raised on Company lands. I take it, that the ratio prevailing between the two types of land, would be reflected in the work of the drivers. On that basis, they spend very nearly as much time hauling independent grower-raised cane as they do hauling company-raised cane. Also, the truck drivers are required to have a driver's license issued by the County of Hawaii. In view of all this evidence it would seem clear that Banez could not be considered an agricultural worker.

In the Waialua case, *supra*, the Circuit Court held that all employees of a large sugar plantation, whose work was necessary to put the crop into a form in which it will not spoil, and to prepare it as "raw sugar," for shipment to the mainland of the United States for manufacturing, are exempt from the Fair Labor Standards Act. The court held that the exemption extended to employees operating the company mill, and private railroad. However, in a series of cases, the Court of Appeals, First Circuit, held that the exemption did not apply to the milling operations of the Company, which milled the cane of independent growers and its own.¹⁹ Later, the same court specifically held that, "the transportation of sugar cane is incident to milling rather than to farming and therefore is not exempt under the Act."²⁰

It is also evident that the Board in setting up the instant units in the Pepeekeo Sugar case, had in mind the rationale of the Calaf case, *supra*, for it specifically refers to that case by name in its decision.

Inasmuch as the Board has followed a rationale similar to that of the Calaf case, in applying the Labor Act to the sugar industry, I feel constrained to follow that authority. In the Waialua case, the Fair Labor Standards Act, its purpose and its legislative history were before the Court. Here, we are concerned with the Labor Management Relations

¹⁹ *Bowie v. Gonzales*, 117 F. 2d 11 (C. A. 1).

²⁰ *Calaf v. Gonzales*, 127 F. 2d 934 (C. A. 1); see also *Vives v. Serralles*, 145 F. 2d 552 (C. A. 1).

Act, 1947, its purpose and its legislative history. I am not persuaded that decisions of courts interpreting the purpose and application of one Act, can be accepted as limiting the interpretation and application of another Act. Nor am I persuaded that the rider in the Board's Appropriation Act is equivalent to amending the Labor Management Act, 1947.

On the evidence before me, Banez is a full-time truck driver, who is engaged in transporting cane, grown by the Company and others, to the mill, as a part of the milling processes. To hold otherwise would be to reach one of the anomalous conclusions referred to by the Board in the Pepeekeo Sugar case, *supra*.

Inasmuch as the Board has considered and answered the question here involved, I feel constrained to follow its decision in the Pepeekeo case, which appears to be buttressed by the decisions of the Court of Appeals, First Circuit. The Supreme Court decision in the Waialua case should end the conflict on this question. For the reasons stated, the motions are denied.

IV. The effect of the unfair labor practices upon commerce

The activities of the Union and the Employer, set forth in Section III above, which occurred in connection with the Employer's operations, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor

disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the contract between the Employer and the Union, effective September 1, 1951, and amended October 29, 1952, contained an illegal discriminatory provision, to wit, the eighth paragraph of Section I, it will be recommended that the Union and the Employer cease and desist from giving effect to the illegal provision, and from entering into, renewing, or enforcing any provision of similar nature in the future.

Having found that the Union and the Employer engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found: (1) that from December 17, 1953, the Employer has discriminated against Favorito P. Banez in his hire, tenure, terms and conditions of employment; (2) that such conduct by the Employer encouraged membership in the Union and interfered with, restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act; and (3) that the Union engaged in unfair labor practices by causing the Employer to so discriminate, thereby restraining employees in the exercise of rights guaranteed by the Act. It will be recommended, therefore, that the Employer offer to Favorito P. Banez immediate and full reinstatement to his former or substantially equivalent position without prejudice to his senior-

ity or other rights and privileges; and that the Union notify the Employer, in writing, and furnish a copy of said notification to Banez, that it has withdrawn its objections to his employment as a senior cane truck driver by the Employer, at its sugar mill in Olaa, Island of Hawaii, Territory of Hawaii, and request the Company to offer Banez full and immediate reinstatement to his former or an equivalent position.

Having found that the Employer and the Union were jointly responsible for the discrimination in the hire and tenure of employment of Banez, it will be recommended that the Employer and the Union, jointly and severally, make Favorito P. Banez whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages from December 17, 1953, until his reinstatement as ordered above, less his net earnings during this period. The loss of earnings will be computed in accordance with the formula of the Board stated in *F. W. Woolworth Company*, 90 NLRB 289.

It is also recommended that the Employer be ordered to make available to the Board upon request, payroll and other records to facilitate the checking of the amount of earnings due.

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. ILWU Local 142 is a labor organization, within the meaning of Section 2 (5) of the Act, which admits to membership both employees and agricultural workers of the Employer.

2. Olaa Sugar Company, Limited, an Hawaiian corporation, is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

3. By executing and enforcing the contract provision, aforesaid, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. By causing the Employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

6. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that Olaa Sugar Company, Limited, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Performing or giving effect to paragraph eight of Section I, of its contract with ILWU Local 142, which discriminates between union and non-union employees of the Company.

(b) Encouraging membership in ILWU Local 142, or in any other labor organization of its employees, by the execution or enforcement of any discriminatory provision similar to the one mentioned above, or by any other discriminatory practices.

(c) In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find will serve to effectuate the policies of the Act:

(a) Make whole Favorito P. Banez for any loss of earnings suffered, in the manner set forth in "The remedy."

(b) Upon request, make available to the Board or its agents for examination or copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary or useful to an analysis of the

(c) Post at its office and mill at Olaa, Island of Hawaii, T. H., copies of the notice attached hereto as Appendix A. Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of the Employer be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other material.²¹

(d) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order what steps the Employer has taken to comply herewith.

Upon the same considerations, I recommend that ILWU Local 142, its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Performing or giving effect to paragraph eight of Section I of its contract with the Employer, which discriminates between union and nonunion employees of the Company.

(b) Causing or attempting to cause the Employer

²¹ The record indicates that the employees live at different places throughout the area owned or controlled by the Employer. This provision of the Order requires that copies of the notice be posted in all those places where such notices are customarily posted for employees.

amount of back pay due under the terms of this Recommended Order.

to discriminate against any of its employees or applicants for employment because such employees are not members of the above-named labor organization.

(c) Restraining or coercing employees of the Employer in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole Favorito P. Banez for any loss of pay suffered by reason of the discrimination against him in the manner set forth in "The remedy."

(b) Notify the Employer, in writing, sending a copy to Favorito P. Banez, that the Union withdraws its objection to his employment as a senior cane truck driver, and requests the Employer to offer Banez immediate and full reinstatement to his former or an equivalent position.

(c) Post at all its business offices in the Olaa area, copies of the notice attached hereto and marked Appendix B. Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by a representative of said Union, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous

places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.²²

(d) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is further recommended that unless within twenty (20) days from the receipt of this Intermediate Report and Recommended Order the Employer and the Union notify the said Regional Director, in writing, that each will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Employer or the Union or both of them to take the action aforesaid.

Dated this 20th day of January, 1955.

/s/ DAVID F. DOYLE,
Trial Examiner.

²² The record indicates that notices to employees are posted by the Union throughout the holdings of the Employer in the Olaa area. This provision requires that copies of this notice be posted in all those places where notices are customarily posted for employees.

APPENDIX A

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will cease performing or giving effect to Section I, paragraph 8, of our current contract with ILWU Local 142, by which the Union may initiate disciplinary action against or the discharge of non-union employees.

We will not enter into, renew, or enforce any agreement with said labor organization by which the Union may cause us to discharge any nonunion employee, except to the extent that such action is permitted under a union security provision in conformity with the Act, as amended.

We will not encourage membership in said labor organization by hearing a grievance, or discharging any employee, on the ground that the employee has disrupted harmonious working relations, or in any other manner discriminate in regard to hire or tenure of employment or any terms or conditions of employment.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

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We will make Favorito P. Banez whole for any loss of pay suffered as a result of our discrimination against him.

All our employees are free to become, to remain, or to refrain from becoming, or remaining, members of the above-named Union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

OLAA SUGAR COMPANY,
LIMITED
(Employer)

Dated:

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Officers, Representatives, Agents, and Members of ILWU Local 142 Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will cease performing or giving effect to paragraph eight of Section I of our contract with Olaa Sugar Company, Limited, because of its discriminatory nature.

We will not enter into, renew, or enforce any provision of our contract with the above-named Employer which permits us to request disciplinary action against, or the discharge of, any nonunion employee, except to the extent that such action is permitted under a union security provision in conformity with the Act, as amended.

We will not cause or attempt to cause any employer to discriminate against employees in regard to their hire or tenure of employment, or any term or condition of employment in violation of Section 8 (a) (3) of the Act, as amended.

We will not in any manner restrain or coerce employees of any employer in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as amended.

We will notify the above-named Company, in writing, and send Favorito P. Banez a copy, that we withdraw our objections to his employment as a senior cane truck driver, and request that he be reinstated to his former or an equivalent position.

We will make Favorito P. Banez whole for any loss of pay suffered because of our discrimination against him.

ILWU LOCAL 142

(Labor Organization)

Dated:

By.....

(Representative)

(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail and Postal Return Receipts attached.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

Comes now Olaa Sugar Company, Limited (hereinafter called the Employer), a party in the above entitled cases, and excepts to the Intermediate Report filed herein by the Trial Examiner, David F. Doyle, and to the proceedings in the above entitled cases in the following particulars:

I.

The Employer excepts to the refusal of the Trial Examiner to grant its motion to dismiss the complaint for lack of jurisdiction. At the commencement of the hearing the Employer filed a written motion to dismiss the complaint. The Trial Examiner refused to grant the motion. Again, at the conclusion of the case, the Employer renewed its motion to dismiss. The decision upon this motion was reserved by the Trial Examiner. In the Intermediate Report the motion to dismiss is denied (Inter. Rep., p. 3). To this denial of the renewed motion to dismiss, as well as to the original denial of the first motion the Employer excepts.

II.

The Employer excepts to the finding by the Trial Examiner that because transportation employees were found in Matter of Pepeekeo Sugar Company, et al. & ILWU, Local 142, et al., 59 NLRB 1532, to be "employees" within the definitions of the Act, and the complainant was a senior cane truck driver, there is no question of his personal status as an employee under the NLRA (Inter. Rep., p. 4). This is an entirely erroneous legal conclusion drawn by the Trial Examiner as will be more fully shown by the brief filed by the Employer in support of these exceptions.

III.

The Employer excepts to the finding by the Trial Examiner that the complainant as a senior cane truck driver was not an agricultural worker (Inter. Rep., p. 16) and his failure to find that the complainant's work was such as to make him an agricultural worker under the Act. In reaching his conclusion the Trial Examiner makes a number of intermediate findings, to which the Employer also excepts: (a) The finding that Mair's testimony was that on an annual basis truck drivers spent approximately 50%-60% of their time on public highways and 40%-50% on company roads (Inter. Rep., p. 8). Mair, a company witness, on cross-examination testified that his best estimate was that about 50% of the senior cane truck driver's time was spent on public roads (Tr. p. 150; repeated on redirect examination, Tr. p. 152). He did testify that his estimate was that actual driving time might be divided, 60%

on public roads and 40% on private roads (Tr. p. 158). Work time and driving time are, of course, two separate and distinct things: (b) the finding that most of the complainant's duties as a truck driver were performed on the public highway (Inter. Rep., p. 17). This finding is erroneous and based upon (1) a misunderstanding of Mair's testimony; (2) a misunderstanding of the nature of complainant's job, and (3) a disregard of witness Anderson's testimony and Employer's Exhibit 6.

Basically the senior cane truck driver's duties are to drive the cane truck from the dispatcher's office in the mill yard to the field, place the truck in position for loading on the plantation road (standing by if necessary to await the completion of the loading of prior trucks), to stand by while the truck is loaded (trimming off loose cane that might fall on the road), to drive the cane to the mill yard and to spot the truck for unloading (standing by until prior trucks are unloaded), and thence back to the field. His working time encompasses not only driving but also the enumerated operations. Mair's testimony was that he estimated half the driver's time was spent on the public road, that eliminating all working time except actual driving time, 60% of the driver's time would be spent on public highways. This, as Mair conceded, was an estimate made on the spur of the moment (Tr. p. 152-153). The Employer's Exhibit 6, consisting of a scientific study of the actual time involved in the truck driver's work, was completely ignored by the Examiner. The exhibit shows that during 1953 actual travel time

per truck trip was 78 minutes; that the average time spent in the field waiting for loading and during loading was 59.07 minutes; that the average unloading time was 18.11 minutes; the total time spent in an average trip, including loading, delivery and unloading, was 155.18 minutes. As a consequence the amount of time spent by the driver in actual travel over both public and private roads was just about half his working time. Applying Mair's estimate that 60% of the driving time would be spent on public roads, the conclusion is inescapable that approximately 30% of the senior cane truck driver's working time was spent driving on public roads, the other 70% being spent in the fields, on field roads or in the mill yard. The finding should therefore have been that less than one-third of the employee's day's work was actually performed on the public highways.

IV.

The Employer excepts to the finding by the Trial Examiner that "The cane from some fields near the mill, and from other fields which could be reached via the old railway bed, could be transported to the mill by using Company roads alone, but the general practice was to use the two-lane, hard-surfaced public roads where practicable." This is an inaccurate finding. The undisputed evidence is that with respect to the fields adjacent to the mill (Fields L, K, E, F and I, G, H, C, C-2 and C-3 as appear on Employer's Ex. 3-A), the public roads are not used at all except when it is necessary to cross them (Tr. pp. 121, 122). Further, the undisputed evidence is

that in working the fields in the Kapoho section and in the Pahoa section on the Pahoa Village side of the Puna Road (Emp's. Ex. 2-A), the road over the old railway bed is used for the haul to the mill in preference to the government road because to get to the government road would require an uphill haul from the fields (Tr. pp. 119-120). In working the other fields it is true the public roads were used where practicable.

V.

The Employer excepts to the finding that the job description of senior cane truck driver is "noteworthy" because "there is no prescribed conduct therein that could possibly be classified as an 'agricultural' task" (Inter. Rep., p. 8) as begging the question. It is indicative of the Trial Examiner's preconceptions that a person operating a truck cannot possibly be engaged in agriculture. This is of course contrary to the decisions of the Board as appears more fully in the supporting brief.

VI.

The Employer excepts to the finding that the poor work record of Banez played no part in the decision to discharge him and that the work record was merely a pretext belatedly thought of and seized upon by the company in an effort to exculpate itself (Inter. Rep., p. 13).

The Trial Examiner has, in making this finding, not only disregarded certain items of evidence but has overemphasized others to the point of distortion. For example, the Intermediate Report stresses that

Banez was a senior truck driver at the time of his discharge (p. 13), the word "senior" being emphasized by underlining. This is to carry the implication that the complainant occupied a more responsible and important position than that of an ordinary cane truck driver. The fact of the matter is that all cane truck drivers on the plantation are senior cane truck drivers. This is apparent from the job title of the position. (Gen. Counsel's Ex. 5) and also from the work record of Banez which shows his transfer from field transportation handyman directly to senior cane truck driver.

The Trial Examiner further states that all the complainant's delinquencies were in the "remote past", referring to the incidents making up his poor work record (Inter. Rep., p. 13). It is hard to justify this conclusion when Employer's Exhibit 7-A shows that on July 24, 1953, less than three months prior to the meeting at which the complaint against Banez was presented to the company, he was suspended for two days for becoming involved in a vehicle collision. The passage of three months hardly places an incident in the remote past. Further, the work record shows that in the 16-month period prior to his discharge on December 17, 1953, he was reprimanded for driving his truck with his wheels locked, resulting in the destruction of two tires; he was reprimanded for failing to follow the directional arrows to the loading field and returning to the mill with an empty truck; and he was suspended for driving his loaded truck three miles on a brake-drum, the tires and wheels on one side of the axle

of the semi-trailer having become detached. In addition he was suspended for the collision previously referred to (Emp's. Ex. 7-B, 7-D, 7-F).

The Trial Examiner finds that the complainant's record was less than perfect but that he was good enough to be retained in employment (Int. Rep., p. 14). In making this finding the Examiner completely ignores the fact that until the layoff in December, 1953 resulting from the mechanization program on the plantation, there was such a shortage of employees that the company had a policy of not permitting any department heads to get rid of any employees unless a cane cutter could be secured as a replacement for every such employee terminated (Tr. p. 265).

It is also to be noted that while the Trial Examiner finds that West, the Assistant Manager of the plantation, testified credibly with respect to the interview on December 23, 1953 with the complainant (Inter. Rep., p. 12), and quotes his testimony verbatim, in which testimony reference is made to West's discussion with the complainant of his poor work record, the Trial Examiner nevertheless goes on to find that "the feature of Banez' work record is merely a pretext, belatedly thought of, and seized upon, by the Company in an effort to exculpate itself". How these two conclusions are compatible cannot be understood.

VII.

The Employer excepts to the Examiner's failure to find that the discharge of the complainant was due to two factors: (1) the stirring up of racial an-

tagonism on the job at a time when such conduct could seriously jeopardize the entire mechanization program of the plantation, and (2) the fact that the employee was not a good worker, his record was poor and at the first time the company was not faced with a shortage of employees, he was let go.

The facts as they clearly appear show that, irrespective as to what may have motivated the Union in bringing this matter to the attention of the company, the company was not concerned with the internal affairs of the Union (See credible testimony of West quoted in Inter. Rep., pp. 12-13) or the complainant's relations with the Union. It was interested only in seeing that harmonious working relations were not disrupted on the job at a time when harmonious working relations were absolutely essential for the successful completion of its layoff program. A reduction in force resulting in the layoff of some 570 out of 1100 employees, some 75% of those to be laid off being Filipinos, the balance of the employees being Japanese and of other racial groups, created such a delicate problem that the management of the plantation was fearful of job action by the Filipinos (Tr. pp. 291-293), testimony apparently not understood by the Trial Examiner (Tr. pp. 338-342). Management had been concerned with this problem since July, 1953, and particularly the complainant's connection with it (Tr. pp. 299-301). The Union's presentation of its complaint in October further crystalized the situation that resulted in the discharge. That the discharge was for cause is clear and the Employer excepts to the Ex-

aminer's finding to the contrary (Inter. Rep., p. 14, lines 18-19).

VIII.

The Employer excepts to the finding of the Examiner that the Employer so enforced the collective bargaining contract as to engage in an unfair labor practice within the meaning of Section 8 (a) (3) of the Act, or interfered with, restrained or coerced any employee in the exercise of any right guaranteed by Section 7 of the Act and so engaged in unfair labor practice within the meaning of Section 8 (a) (1) of the Act. The basis for the exceptions to these findings is contained in the material set forth under the various exceptions hereinabove enumerated.

Wherefore, the Olaa Sugar Company, Limited respectfully prays that the complaint against it be dismissed and for such other and further relief as may be just and proper.

Dated at Honolulu, T. H., this day of, 1955.

OLAA SUGAR COMPANY,
LIMITED,

By SMITH, WILD, BEEBE &
CADES,

Its Attorneys,

By J. EDWARD COLLINS.

[Title of Board and Cause.]

EXCEPTIONS OF ILWU LOCAL 142 TO INTERMEDIATE REPORT AND RECOMMENDED ORDER

Comes now ILWU Local 142, respondent-union above named, by its attorneys, Bouslog & Symonds, and excepts to the Intermediate Report and Recommended Order of the trial examiner herein as follows:

1. The Union excepts to the Examiner's refusal to grant the Union's motion to dismiss the complaint for lack of jurisdiction (General Counsel's Exhibits 10 and 12; see R. 7) either at the outset of the hearing, the conclusion thereof, or in the Intermediate Report.

2. The Union excepts to the Examiner's findings that Banez, the complaining employee, was not an agricultural worker (I.R. 16 et seq.); excepts to the Examiner's application of the Pepeekeo Sugar case, 59 NLRB 1532, to the instant case; and further excepts to the findings as to the operations of the Employer (I.R. 4-8).

3. The Union excepts to the Examiner's findings that Section I, paragraph 8, of the contract, was or is discriminatory or illegal (I.R. 14 et seq.).

4. The Union excepts to the Examiner's findings that the Union engaged in unfair labor practices by causing the Employer to discriminate against Banez, thereby restraining employees in the exercise of rights guaranteed by the Act (I.R. 18).

5. The Union excepts to the Examiner's ruling prohibiting the Union from presenting evidence as to the conduct of Banez in respect to fostering racial hatred and disunity among employees of Employer prior to the discharge (R. 172, l. 24; R. 172, l. 3, ll. 12-16; R. 177, ll. 2-4; R. 219, l. 25; R. 220, ll. 18-19; R. 221, ll. 8-10); and further objects to the Examiner's ruling preventing Union witnesses from detailing the said conduct of Banez (R. 179, ll. 20-22; R. 186, ll. 15-18).

6. The Union excepts to the Examiner's refusal to find that the discharge of Banez was due to his fostering and promoting racial hatred and antagonism on the job which presented a serious hazard to employees, the Union and the Employer alike at a critical and delicate stage in the Employer's technological adjustment that affected all parties concerned. (See R. 328-343; R. 191-199.)

7. The Union excepts to the Examiner's findings and conclusions that the Union caused the Employer to discriminate against employees in violation of Section 8 (a) (3) of the Act, thus engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act; and that the Union restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, thus engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act (I.R. 19).

Wherefore, ILWU Local 142 prays the complaint against it be dismissed.

Dated: Honolulu, Hawaii, this 25th day of February, 1955.

ILWU LOCAL 142,
By BOUSLOG & SYMONDS,
By JAMES A. KING,
Its Attorneys.

Proof of Service attached.

United States of America
Before the National Labor Relations Board

Case No. 37-CA-84

OLAA SUGAR COMPANY, LIMITED

and

FAVORITO P. BANEZ, AN INDIVIDUAL

Case No. 37-CB-6

ILWU LOCAL 142

and

FAVORITO P. BANEZ, AN INDIVIDUAL

DECISION AND ORDER

On January 20, 1955, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative

action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent Company and the Respondent Union filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings,¹ conclusions,² and recommendations.

1. The Trial Examiner found, and we agree, that Banez, the charging party herein, is not an agricultural worker excluded from the coverage of the Act.

The Respondents contend that Banez should be found to be an agricultural worker under the Board's decision in the Clinton Foods case.³ In that case, the Board found, in accord with the desires of the parties, that "semi-drivers," who haul fruit exclusively from the roadside to the Employer's

¹ In his Findings of Fact, the Trial Examiner inadvertently failed to find that the Respondent Company is engaged in commerce within the meaning of the Act. We so find.

² In his Conclusions of Law, the Trial Examiner inadvertently failed to conclude that by executing and enforcing the contract provision in issue herein, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act. We so conclude.

³ Clinton Foods, Inc., 108 NLRB 85.

processing plant, are industrial employees; and that "goat drivers," who haul fruit exclusively from the Employer's groves to the roadside, are agricultural employees. The Board further found that "flat drivers," who haul fruit directly from the groves to the plant, are agricultural employees, because of the proximity of the groves to the processing plant (3 miles maximum), the fact that in hauling directly from the groves to the plant the "flat drivers" spend a substantial part of their time on the farm property, and the fact that the operation is conducted by and for the benefit of the employer who admittedly is engaged in a farming operation. For these reasons, the Board concluded that the "flat drivers" were distinguishable from similar drivers who the Board, in the past, had customarily found to be nonagricultural.⁴

The Respondents contend that the Respondent Company's drivers fall into the same category as the "flat drivers" in the Clinton Foods case, and are therefore agricultural workers. However, Banez and the other truck drivers of the Respondent Company are engaged exclusively in hauling sugar cane from the roadside of the sugar cane fields to the Respondent Company's plant. It appears, therefore, that the general operation performed by the Company's truck drivers is more like that of the "semi-drivers" in the Clinton Foods case, and not like that of the "flat drivers," and is therefore industrial

⁴ See *L. Maxcy, Inc.*, 78 NLRB 525, and cases cited therein.

in character. Moreover, even if the general operation performed by the Company's truck drivers be considered as more like that of the "flat drivers" in that case, there are distinguishable factors. Thus, some of the fields from which the cane is hauled are as much as 23 miles from the plant. Moreover, while the truck drivers spend about 38 percent of their time at the roadside during the loading of the trucks, they normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane sticks which might be protruding from the truck so that the cane sticks do not strike any objects or persons when the truck is being driven. Accordingly, unlike the "flat drivers" in the Clinton Foods case, the drivers in the instant case perform no actual work on the farm itself so as to be even partly engaged in an agricultural function.⁵ For, contrary to the contention of the Respondent Company, we do not consider the use of the Respondent Company's private roads by the drivers for the sole purpose of transporting the cane from the roadside to the plant as work actually performed on the farm, where the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of their driving time on the public highways. And there is, of course, clearly no merit to the Respondent Company's contention that the time spent by

⁵ Thus, the "part-time" rule of the Clinton Foods case, which our dissenting colleague relies on, is not applicable to the instant case.

the drivers at the plant during unloading is time spent in work actually performed on the farm. In addition, independent growers cultivate about as much acreage and grow about as much sugar cane for processing at the Company's plant as the Company does, and the Company's truck drivers spend about one-half of their time hauling the cane of independent growers. Therefore, about one-half of the Company's trucking operation is an independent trucking operation which is conducted for the benefit of other employers. Finally, although the Company's transportation section is considered by the Company as being part of its harvesting department, we note that the truck dispatcher is located at the plant, and that the truck dispatcher supervises the work of the drivers from the plant, which also indicates that the Company's trucking operation is carried on as an incident to, or in conjunction with, its plant operations, rather than its farming operations. We therefore reject the Respondents' contention that Banez should be found to be an agricultural worker under the Board's decision in the Clinton Foods case.

Moreover, this case is also distinguishable from *Maneja v. Waialua Agricultural Company*, recently decided by the United States Supreme Court.⁶ In that case, the Supreme Court held that sugar cane plantation railroad employees who haul cane from the fields to the processing plant, and also transport farm laborers and farming equipment to the fields,

⁶ 349 U. S. 254, decided May 23, 1955.

on a narrow-gauge railway extending throughout the plantation, are agricultural employees as defined in the Fair Labor Standards Act.⁷ Thus, the Court did hold that employees who transport cane from the fields to a processing plant, like the truck drivers in the instant case, are agricultural employees. However, the Court stressed the dual function of the employees involved there in support of its finding. Thus, at the very outset the Court stated that the employees there “not only” haul cane from the fields to the plant, “but also” transport the farm laborers and farm equipment to the fields; later stated that “The railroad is used exclusively for the effectuation of the agricultural function of transporting exempt agricultural workers to the fields, together with their equipment and supplies, and hauling freshly cut cane to the processing plant” (emphasis supplied); and concluded with the statement that “Without it or some other ‘haul’, the land could not be cultivated and the cane, after harvest, would spoil in the fields and be lost” (emphasis again supplied). In the instant case, the truck drivers perform the single function of transporting the cane from the fields to the plant, and have no connection with the cultivation of the cane. Moreover, the Court expressly rested its decision on the fact that “Waialua’s transportation system is all either in or contiguous to its fields, save the

⁷ As stated by the Trial Examiner, the Board, because of the rider to its appropriation, must be governed by the definition of agricultural employee in Section 3 of the Fair Labor Standards Act.

necessary trackage at the mill to accommodate cane cars arriving from various sections of the plantation'' (emphasis supplied). In the instant case, no part of the Respondent Company's transportation system is in the fields, for as we have found above, we do not consider the use of the Company's private roads by the drivers for the sole purpose of transporting the cane from the roadside of the fields to the plant as work performed on the farm, where the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of their driving time on the public highways. And while all of these private roads appear to be contiguous to the fields, a considerable portion of the public highways used are not contiguous to the fields. In fact, a long public highway not contiguous to any of the fields must be used to transport cane from the Company's southern fields to the plant which is in the geographically separated northern fields. Added to this, of course, is the fact that 60 percent or more of the Company's transportation system is on the public highways, whereas Waialua's entire transportation system was on its own private railroad beds. Finally, the Court also rested its decision on the fact that Waialua transported on its railroad from the fields to the plant only cane that Waialua grew in the fields; whereas in the instant case independent growers cultivate about as much acreage and grow about as much cane for processing at the Company's plant as the Company does, and the Company's truck drivers spend about one-half of

their time hauling the cane of independent growers. Thus, in *Bowie v. Gonzales*, 117 F. 2d 11 (C.A. 1), the Court of Appeals held that the agricultural exemption under the Fair Labor Standards Act did not apply to transportation employees who hauled cane grown by independent growers. And in *Calaf v. Gonzales*, 127 F. 2d 934 (C.A. 1), the Court held this exemption to be inapplicable to transportation employees hauling cane grown by their own employer, because in its opinion the facts showed that the transportation was incident to milling rather than to farming. In its discussion of the *Bowie* and *Calaf* cases in the *Waialua* case, the Supreme Court did not criticize either case, but, on the contrary, recognized that both were distinguishable from *Waialua*, stating that "We do not believe that either *Bowie* or *Calaf* is apposite."⁸ We conclude, therefore, that the agricultural exemption under the Fair Labor Standards Act does not apply to transportation employees, who, as here,

⁸ See also *Farmers Irrigation Co. v. McComb*, 337 U. S. 755, where the Supreme Court noted that one requirement for the agricultural exemption is that the "practices be incidental to 'such' farming" (*Id.*, 766, fn. 15). "Thus," said the Court, "processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture," citing with approval *Bowie v. Gonzales*, 117 F. 2d 11 (*Id.*, 766-767; emphasis supplied).

haul both cane grown by their employer and cane grown by independent growers.

In view of the foregoing, and upon the entire record, we find that Banez is not an agricultural laborer.

2. The Trial Examiner found, and we agree, that the provision in the contract between the Respondent Company and the Respondent Union under which Banez was discharged is illegal, and that the Respondent Union and the Respondent Company violated the Act by respectively causing the discharge of, and discharging, Banez pursuant to that provision.

The provision in the contract reads as follows: "Any claim by the Union that action on the job of a non-union employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruption of harmonious working relations shall be grounds for discipline or discharge." (Emphasis supplied.) On October 19, 1953, the Union requested the Company to discharge Banez, who was not a member of the Union, for violation of this provision, but at the same time stated that the Union felt that it could take care of 2 union member employees who had engaged in the same conduct as Banez. On December 17, 1953, the Company discharged Banez for the stated reason that he had violated this provision of the contract; and in another letter to Banez on January 7, 1954, the Company again stated this as the reason for the discharge. The 2 union member employees who had engaged

in the same conduct for which Banez was discharged were still employed by the Company at the time of the hearing.

In essence, the provision of the contract gives the Union the right to request, and the Company to effect, the disciplining or discharge of only non-union employees for "disrupting harmonious working relations," and gives the Union and the Company no such right with respect to union members. By thus subjecting non-union employees to possible discipline or discharge for such conduct and exempting union employees, the necessary effect of such a provision is to encourage membership in the Union in a manner not permitted by Section 8 (a) (3) of the Act.⁹ The provision is, therefore, discriminatory per se. Moreover, it is clear, from the disparate treatment given Banez, a non-union employee, on the one hand, and the 2 union member employees, on the other hand, that the provision was discriminatorily enforced against Banez. Accordingly, we find that the Union's request for the discharge of Banez, and the Company's compliance with that request, pursuant to such a discriminatory provision, were unlawful.¹⁰

⁹ The proviso to Section 8 (a) (3) only permits compulsory union membership under certain prescribed conditions.

¹⁰ For the reasons stated by him, we agree with the Trial Examiner's finding that Banez' alleged poor work record was not a motivating factor in the Company's decision to discharge Banez. In any event, the Company in its brief concedes that Banez' alleged bad work record was not the motivating

The Respondents contend that the contract provision is not illegal, because it simply incorporates the right of the Union and the Company to effect the discharge of an employee for "disrupting harmonious working relations." Even if the Union and the Company jointly did have the right to effect a discharge for such reasons unrelated to any aspect of union membership or union fealty,¹¹ they could not lawfully incorporate such right in a contract provision which on its face applies only to non-union employees and thus discriminates against such employees for what might otherwise be valid grounds for effecting a discharge. Nor do we find any merit in the Respondent Company's further contention that the provision is not illegal, because the contract does not restrict or abrogate the Company's basic right, apart from the contract, to discipline or discharge union employees for engaging in such conduct. The contract may not restrict or abrogate the Company's basic right in this respect, but it does restrict and abrogate any joint action in this respect by the Company and the Union and is thus discriminatory. This was clearly demonstrated by the disparate treatment of Banez, the non-union employee, and the 2 union employees

cause for his discharge, but was at most only a factor that was considered in determining whether the disciplinary action to be taken under the contract provision should be a discharge.

¹¹ See, however, *Studebaker Corporation*, 110 NLRB 1307, where the Board reserved ruling on a similar issue.

who had engaged in the same conduct as Banez. The Company also contends that the provision is not illegal, because it only obligates the Company to entertain Union grievances involving disruptive conduct by a non-union employee, and does not require the Company to discipline or discharge the employee. The concluding sentence of the provision states that "Repeated disruption of harmonious working relations shall be grounds for discipline or discharge." (Emphasis supplied.) In our opinion, this mandatory language does require the Company to discipline or discharge, upon a grievance presented by the Union, a non-union employee who has engaged in "repeated disruption of harmonious working relations." Accordingly, we find no merit in this contention.

The Respondents also contend that the discharge of Banez under the contract provision was not illegal, because they were simply exercising their right to effect the discharge of an employee for "disrupting harmonious working relations." As already indicated, we do not necessarily agree with the contention that the Union and the Company jointly had the right to effect a discharge for such reasons unrelated to any aspect of union membership or union fealty. In any event, however, the discharge of Banez under a provision which was otherwise discriminatory on its face was clearly illegal, particularly where, as here, there is other evidence which shows that the provision was discriminatorily enforced against Banez, viz., the disparate treatment of Banez, the non-union employee,

and the 2 union employees who had engaged in the same conduct as Banez.

Finally, the Respondent Company urges as a defense to the discharge of Banez that his conduct was seriously jeopardizing the Company's operations and might have resulted in work stoppages. However, such economic pressures on an employer are no defense to what is otherwise a discriminatory discharge.¹²

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Olaa Sugar Company, Limited, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Performing or giving effect to paragraph eight of Section I, of its contract with ILWU Local 142, which discriminates between union and non-union employees of the Company;

(b) Encouraging membership in ILWU Local 142, or in any other labor organization of its employees, by the execution or enforcement of such a discriminatory provision;

(c) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, except to the extent that such right may be affected by

¹² See *The Englander Company, Inc.*, 108 NLRB 38; *Wyandotte Chemicals Corporation*, 108 NLRB 1406.

an agreement in conformity with Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Favorito P. Banez immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings suffered as a result of the discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The Remedy";

(b) Preserve and make available to the Board or its agents, upon request for examination or copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary or useful to an analysis of the amount of back pay due and the rights of employment under the terms of this Order;

(c) Post at its office and mill at Olaa, Island of Hawaii, T. H., copies of the notice attached hereto as Appendix A.¹³ Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of the Company, be posted immedi-

¹³ If this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words, "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

ately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material;¹⁴

(d) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order what steps the Company has taken to comply herewith.

Upon the same considerations, it is hereby ordered that ILWU Local 142, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Performing or giving effect to paragraph eight of Section I of its contract with the Company, which discriminates between union and nonunion employees of the Company;

(b) Causing or attempting to cause the Company to discriminate against any of its employees because such employees are not members of the above-named labor organization;

(c) In any other manner restraining or coercing employees of the Company in the exercise of their rights under Section 7 of the Act, except to the extent that such right may be affected by an agree-

¹⁴ The record indicates that the employees live at different places throughout the area owned or controlled by the Company. This provision of the Order requires that copies of the notice be posted in all those places where such notices are customarily posted for employees.

ment in conformity with Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole Favorito P. Banez for any loss of pay suffered by reason of the discrimination against him in the manner set forth in the Section of the Intermediate Report entitled "The remedy";

(b) Notify the Company, in writing, sending a copy to Favorito P. Banez, that the Union withdraws its objection to his employment as a senior cane truck driver, and requests the Company to offer Banez immediate and full reinstatement to his former or an equivalent position;

(c) Post at all its business offices in the Olaa area, copies of the notice attached hereto and marked Appendix B.¹⁵ Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by a representative of said Union, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps

¹⁵ If this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

shall be taken to insure that such notices are not altered, defaced, or covered by other material;¹⁶

(d) Mail to the Regional Director for the Twentieth Region, signed copies of the notice attached hereto marked Appendix B for posting, the Company willing, at the Company's office and mill at Olaa, Island of Hawaii, T. H., in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed as provided above, be returned forthwith to the Regional Director for such posting;

(e) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order what steps it has taken to comply herewith. •

Dated, Washington, D. C., October 26, 1955.

[Seal] ABE MURDOCK, Member,
 IVAR H. PETERSON, Member,
 BOYD LEEDOM, Member,
 National Labor Relations Board.

Philip Ray Rodgers, Acting Chairman, dissenting:

I would dismiss the complaint in this case on the ground that the Company's drivers, including Ba-

¹⁶ The record indicates that notices to employees are posted by the Union throughout the holdings of the Company in the Olaa area. This provision requires that copies of this notice be posted in all those places where notices are customarily posted for employees.

nez, are agricultural employees, and thus excluded from the Act's coverage.

The Company's drivers haul sugar cane from the fields on which the cane is grown to the Company's processing plant. A little more than half the fields' acreage, or 7,418 acres, is owned and cultivated by the Company; the balance, or 6,911 acres, is owned and cultivated by independent growers.

To the extent that the drivers haul sugar cane grown on Company-owned land, I believe that the Board, under the Supreme Court's decision in *Maneja v. Waialua Agricultural Company*, 349 U. S. 254, must find the drivers to be agricultural employees. As I read the *Waialua* case, the Supreme Court there said that under "the comprehensive wording of the agricultural exemption" the transportation of sugar cane to a processing plant by a grower of the cane is an agricultural function.¹⁷

¹⁷ The essence of the Court's thinking in the *Waialua* case with respect to the agricultural exemption appears, I believe, in this passage, 349 U. S. 254, 261:

Furthermore, had *Waialua* not owned a mill its transportation activities from field to mill would come squarely within the agriculture exemptions covering 'delivery to storage or to market or to carriers for transportation to market.' We do not believe the Congress intended to deprive farmers having their own mills of the exemption it afforded farmers who do not. In the debate on the amendment extending exemption to 'delivery to market,' its sponsor made clear that auxiliary activity of the kind here involved would be included within that term. 81 Cong. Rec. 7888.

That the drivers in this case do not haul laborers and equipment, and that they are routed over public highways for a portion of their hauls, are factors which, I believe, are not sufficient to so differentiate the drivers from the railroad workers in Waialua case as to give them a different status under the agricultural exemption. To the extent, however, that the drivers haul cane grown on land owned and cultivated by the independent growers, they appear to be engaged in a commercial hauling venture undertaken by the Company. To that extent, therefore, I would find the drivers to be engaged in nonagricultural work.

But in the Clinton Foods case, 108 NLRB 85, 89, the Board recently held that employees who divide their time between agricultural and non-agricultural employment, spending a substantial part of their time in performing agricultural duties, will be deemed to be "agricultural laborers." I would apply this holding of the Clinton Foods case, which is now established Board doctrine,¹⁸ to the facts of this case, and as it appears, for the reasons I have stated, that the Company's drivers spend a substantial part of their time in an agricultural function, I would find them to be agricultural employees.

Dated, Washington, D. C., October 26, 1955.

PHILIP RAY RODGERS,
Acting Chairman,
National Labor Relations Board.

¹⁸ See Hershey Estates, 112 NLRB No. 164, pp. 3-4.

APPENDIX A

Notice to All Employees: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will cease performing or giving effect to Section I, paragraph 8, of our current contract with ILWU Local 142, by which the Union may initiate disciplinary action against or the discharge of non-union employees.

We Will Not enter into, renew, or enforce any agreement with said labor organization by which the Union may cause us to discharge any nonunion employee, except to the extent that such action is permitted under a union security provision in conformity with the Act, as amended.

We Will Not encourage membership in said labor organization under such an agreement by hearing a grievance, or discharging any nonunion employee, on the ground that the employee has disrupted harmonious working relations, or in any other manner discriminate in regard to hire or tenure of employment or any terms or conditions of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will Offer Favorito P. Banez immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of our discrimination against him.

All our employees are free to become, to remain, or to refrain from becoming, or remaining, members of the above-named Union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act, as amended.

OLAA SUGAR COMPANY,
LIMITED,
(Employer)

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Officers, Representatives, Agents, and Members of ILWU Local 142: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will cease performing or giving effect to paragraph eight of Section I of our contract with Olaa Sugar Company, Limited, because of its discriminatory nature.

We Will Not enter into, renew, or enforce any provisions of our contract with the above-named Employer which permits us to request disciplinary action against, or the discharge of, any nonunion employee, except to the extent that such action is permitted under a union security provision in conformity with the Act, as amended.

We Will Not cause or attempt to cause any employer to discriminate against employees in regard to their hire or tenure of employment, or any term or condition of employment, in violation of Section 8 (a) (3) of the Act, as amended.

We Will Not in any other manner restrain or coerce employees of any employer in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as amended.

We Will notify the above-named Company, in writing, and send Favorito P. Banez a copy, that we withdraw our objections to his employment as a senior cane truck driver, and request that he be reinstated to his former or an equivalent position.

We Will make Favorito P. Banez whole for any

loss of pay suffered because of the discrimination against him.

ILWU LOCAL 142,
(Labor Organization)

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail and Postal Return Receipts attached.

[Title of Board and Cause.]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “Olaa Sugar Company, Limited and Favorito P. Banez, an individual” and “ILWU Local 142 and Favorito P. Banez, an individual,” the same being known as Case Nos. 37-CA-84 and 37-CB-6, respectively, be-

fore said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceedings was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner David F. Doyle on August 23 through 25, 1954, together with all exhibits introduced in evidence, also rejected exhibits.

(2) Copy of Trial Examiner Doyle's Intermediate Report and Recommended Order dated January 20, 1955; order transferring case to the Board, dated January 20, 1955, together with affidavits of service and United States Post Office return receipts thereof.

(3) Exceptions to the Intermediate Report received from Olaa Sugar Company, Limited (Respondent herein) on February 25, 1955.

(4) Exceptions to the Intermediate Report received from ILWU Local 142 (Respondent Union herein) on February 28, 1955.

(5) Copy of Decision and Order issued by the National Labor Relations Board on October 26, 1955, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 29th day of June, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary,
National Labor Relations
Board.

[Endorsed]: No. 15143. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Olaa Sugar Company, Limited and ILWU Local 142, Respondents. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: July 6, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15143

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

OLAA SUGAR COMPANY, LIMITED, and
ILWU LOCAL 142, Respondents.

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Olaa Sugar Company, Limited, (hereinafter called Respondent Company) its officers, agents, successors, and assigns and ILWU Local 142, (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "Olaa Sugar Company, Limited and Favorito P. Banez, an individual, Case No. 37-CA-84" and "ILWU Local 142 and Favorito P. Banez, an individual, Case No. 37-CB-6."

In support of this petition the Board respectfully shows:

(1) Respondent Company is an Hawaiian corporation engaged in business in the territory of Hawaii and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the territory of Hawaii, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 26, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors, and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable

Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent Company, its officers, agents, successors, and assigns and Respondent Union, its officers, representatives, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C. this 22nd day of May, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

Certificate of Service attached.

[Endorsed]: Filed May 23, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF ILWU LOCAL 142

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now ILWU Local 142, one of the respondents above named, by Bouslog & Symonds, its attorneys, and answering the petition for enforce-

ment of an order of the National Labor Relations Board shows as follows:

1. Admits the allegations of Paragraph (1) of the petition, except respondent denies that any unfair labor practices occurred herein and denies this court has jurisdiction under Section 10 (e) of the National Labor Relations Act, as amended (29 USC §§ 151 et seq.) for the reasons which more fully hereinafter appear.

2. Admits the allegations of Paragraph (2).

3. Paragraph (3) requires no answer.

4. The National Labor Relations Board is without jurisdiction herein in that the charging party, Favorito P. Banez, at the time of the acts charged was not an employee as defined in Section 2 (3) of the Act (29 USC Section 152 (3)) by virtue of his being an agricultural laborer and as such excluded from the coverage of the Act.

5. The National Labor Relations Board is without jurisdiction herein in that various appropriation acts, to wit the National Labor Relations Board Appropriation Act, 1954 (Title III, Act of July 31, 1953, Pub. L. 170, 83d. Congress, 1st Session), National Labor Relations Board Appropriation Act, 1955 (Title III, Act of July 2, 1954, Pub. L. 472, 83d. Congress, 2d Session) and the Departments of Labor, and Health, Education and Welfare, and Related Agencies Appropriation Act, 1956 (Title III, Act of August 1, 1955, Pub. L. 195, c. 457, 84th Congress, 1st Session) forbid Board funds from being used with respect to agricultural laborers, as defined in Section 2 (3) of the Act and as defined in

Section 3 (f) of the Fair Labor Standards Act (29 USC Section 203 (f)).

6. The National Labor Relations Board has held in other cases that employees whose duties are the same as or similar to those of the charging party herein, Favorito P. Banez, are deemed agricultural laborers and accordingly excluded from coverage of the Act.

Wherefore, respondent ILWU Local 142 prays that the petition herein be dismissed.

Dated: Honolulu, Hawaii, this 7th day of June, 1956.

BOUSLOG & SYMONDS,
/s/ By MYER C. SYMONDS,
Attorneys for ILWU Local 142.

Certificate of Service attached.

[Endorsed]: Filed June 11, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF OLAA SUGAR COMPANY,
LIMITED

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Now comes Olaa Sugar Company, Limited, one of the respondents above named, by Smith, Wild, Beebe & Cades, its attorneys, and answering the

petition for enforcement of an order of the National Labor Relations Board heretofore filed in this Court in that certain consolidated case described in the opening paragraph of said petition, shows as follows:

1. This respondent admits that it is an Hawaiian corporation engaged in business in the Territory of Hawaii, but it denies that it engaged in any unfair labor practice herein, and denies that this Court has jurisdiction of the petition of the National Labor Relations Board, as alleged in paragraph (1) of said petition, for the reasons more fully set out hereinafter.

2. This respondent admits the allegations of paragraph (2) of said petition.

3. This respondent states that the National Labor Relations Board was, at the time it purported to assume jurisdiction of the instant case, and that it still is, without jurisdiction to prosecute, hear, or determine the matter of the unfair labor practice, and is without jurisdiction to bring or pursue its petition herein, in that various Acts of Congress appropriating funds for the administration, salaries, costs and expenses of the National Labor Relations Board, to wit, the "National Labor Relations Board Appropriation Act, 1947," Pub. 549, Ch. 672, Title IV, 79th Congress, Second Session; the "National Labor Relations Board Appropriation Act, 1949," Pub. 639, Ch. 465, 80th Congress, Second Session; the "National Labor Relations Board Appropriation Act, 1949," Pub. 639, Ch. 465, 81st Congress, First Session; the "National Labor Relations Board

Appropriation Act, 1952," Pub. 134, Ch. 373, 82nd Congress, First Session; the "National Labor Relations Board Appropriation Act, 1953," Pub. 452, Ch. 375, 82nd Congress, Second Session; the "National Labor Relations Board Appropriation Act, 1954," Pub. 170, Ch. 296, 83rd Congress, First Session; the National Labor Relations Board Appropriation Act, 1955," Pub. 472, Ch. 457, 83rd Congress, Second Session; the "Departments of Labor and Health, Education, and Welfare, and Related Agencies Appropriation Act, 1956," Pub. 195, Ch. 457, 84th Congress, First Session, prohibit said Board from using any of its funds with respect to agricultural laborers, as used in Section 2 (3) of the National Labor Relations Act as amended, and as defined in Section 3 (f) of the Fair Labor Standards Act.

4. That the decision of the National Labor Relations Board in holding in the instant case that the charging party, Favorito P. Banez, was not and is not an agricultural laborer, nevertheless conceded in said decision that the Board, "because of the rider to its appropriation, must be governed by the definition of agricultural employee in Section 3 of the Fair Labor Standards Act"; that since said restriction first became effective, the said Board has consistently held in other cases before it that employees whose duties were the same as or similar to those of the said Banez herein, were agricultural laborers and therefore excluded from the coverage of the National Labor Relations Act, and accordingly, from the Board's jurisdiction; and that its decision

in the instant case constitutes a radical and unauthorized deviation from its prior decision.

Wherefore, respondent Olaa Sugar Company, Limited, prays that the petition herein be dismissed.

Dated: Honolulu, Hawaii, this 8th day of June, 1956.

SMITH, WILD, BEEBE & CADES,
/s/ By ARTHUR G. SMITH,
Attorneys for Olaa Sugar Company,
Limited.

Certificate of Service attached.

[Endorsed]: Filed June 11, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

In this proceeding the National Labor Relations Board will urge and rely upon the following points:

1. The Board properly found that the senior cane truck drivers employed by the respondent employer (Olaa Sugar Company, Ltd.), are not "agricultural laborers" exempted from the Act's protection.

2. The Board properly found that by entering into a contract vesting in the respondent Union (ILWU Local 142) the power to cause the discharge of nonunion employees only, the respondent

employer (Olaa Sugar Company, Ltd.) violated Section 8 (a) (3) and (1) of the Act and the respondent Union violated Section 8 (b) (2) and (1) (A).

3. Substantial evidence on the record considered as a whole supports the Board's findings of fact and conclusions that the respondent employer discriminatorily discharged nonunion member Banez in violation of Section 8 (a) (3) and (1) of the Act and that the respondent Union caused the respondent employer to thus discriminate against non-member Banez and thereby violated Section 8 (b) (2) and (1) of the Act.

Dated at Washington, D. C., this 29th day of June, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

[Endorsed]: Filed July 2, 1956. Paul P.
O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 37-CA-84

In the Matter of

OLAA SUGAR COMPANY, LIMITED

and

FAVORITO P. BANEZ, AN INDIVIDUAL.

Case No. 37-CB-6

In the Matter of

ILWU LOCAL 142

and

FAVORITO P. BANEZ, AN INDIVIDUAL.

TRANSCRIPT OF PROCEEDINGS

Third Circuit Courtroom, Federal Building, Hilo,
Hawaii, Monday, August 23, 1954.

Pursuant to notice, the above-entitled matters
came on for hearing at 10 a.m.

Before: David F. Doyle, Trial Examiner.

Appearances: David Karasick, Esq., 336 Federal
Bldg., Honolulu, Hawaii, appearing on behalf of the
General Counsel, NLRB. J. Edward Collins, Esq.,
of the law firm of Smith, Wild, Beebe & Cades,
P. O. Box 224, Honolulu, Hawaii, appearing on be-
half of Olaa Sugar Company, Limited, respondent-
employer. James A. King, Esq., of the law firm of
Bouslog & Symonds, 63 Merchant St., Honolulu,

Hawaii, appearing on behalf of ILWU, Local 142, respondent-union. [2]*

Proceedings

Trial Examiner Doyle: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Olaa Sugar Company, Limited, and ILWU, Local 142, Case No. 37-CA-84, and 37-CB-6. [3]

* * * * *

Mr. Karasick: At this time, Mr. Examiner, I have asked the court reporter to mark certain formal documents in this proceeding as General Counsel's Exhibits 1 through 12, inclusive, for identification. These formal documents are as follows:

General Counsel's Exhibit 1 for identification is the charge filed against the Olaa Sugar Company, Limited, in the Thirty-seventh Subregional Office of the National Labor Relations Board, on January 6, 1954.

General Counsel's Exhibit 2 for identification is the affidavit of service of the charge, together with the return post-office receipt attached thereto. [5]

General Counsel's Exhibit 3 for identification is the charge filed against United Sugar Workers, ILWU, Local 142, Unit 3, with the Thirty-seventh Subregional Office of the National Labor Relations Board, on January 6, 1954, and docketed under the number 37-CB-6.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

General Counsel's Exhibit 4 for identification is the affidavit of service of the charge in the Case No. 37-CB-6 upon the respondent union, together with return post-office receipt attached thereto.

General Counsel's Exhibit 5 for identification is the amended charge filed against ILWU, Local 142, in Case 37-CB-6 on March 15, 1954.

General Counsel's Exhibit 6 for identification is the affidavit of service of the amended charge upon the respondent union, together with return post-office receipt attached thereto.

General Counsel's Exhibit 7 for identification is the consolidated complaint in Cases Nos. 37-CA-84 and 37-CB-6, issued by Gerald A. Brown, Regional Director of the National Labor Relations Board, Twentieth Region, on July 13, 1954.

General Counsel's Exhibit 8 for identification is the notice of hearing, scheduling the hearing in this proceeding at the present time, at this place, issued by Gerald A. Brown, Regional Director of the National Labor Relations Board on July 13, 1954. [6]

General Counsel's Exhibit 9 for identification is the affidavit of service of notice of hearing, consolidated complaint, and original amended charge, on each of the parties to these proceedings, together with return post-office receipts attached thereto.

General Counsel's Exhibit 10 for identification is the motion to dismiss for lack of jurisdiction, and answer, filed on behalf of the respondent union on July 22, 1954.

General Counsel's Exhibit 11 for identification is

the answer of Olaa Sugar Company, filed on August 3, 1954.

General Counsel's Exhibit 12 for identification is the amended motion to dismiss for lack of jurisdiction, filed on behalf of the respondent union on August 19, 1954.

I offer these documents in evidence as General Counsel's Exhibits 1 through 12, both inclusive, having previously been submitted to the parties for their inspection.

Trial Examiner: Is there any objection to the admission of these documents?

Mr. King: No objection.

Mr. Collins: No objection.

Trial Examiner: The documents are admitted in evidence and shall bear as exhibit numbers the number designation which they bore as exhibits for identification.

(The documents referred to were marked as General Counsel's Exhibits 1 through 12, inclusive, and were received in evidence.) [7]

Mr. Collins: Mr. Examiner, at this time I wish to file on behalf of the Olaa Sugar Company a motion to dismiss for lack of jurisdiction. This is in substance the same type of motion as has been appended to the union's answer and encompasses the material also encompassed in their amended motion.

* * * * *

Mr. Collins: If the Examiner please, it is the contention of the company and apparently the same contention of the union that the individual involved in this case was an agricultural employee and as

such falls without the jurisdiction of the National Labor Relations Act and of the Board. That does not appear, of course, in the pleadings themselves, except as raised by the union in its answer and motion. [9]

* * * * *

Mr. Karasick: Mr. Examiner, it is perfectly true that the respondent-employer and the respondent-union and the General Counsel are in disagreement as to the issue of agricultural labor in this case. The General Counsel's position is that the complainant in this case is an employee within the meaning of the Act and not an agricultural laborer.

* * * * *

Mr. Karasick: Mr. Examiner, during recess counsel have agreed that the respondent-employer's motion to dismiss for lack of jurisdiction, which was presented to you this morning, be included in the General Counsel's list of formal exhibits. And I have accordingly asked the court reporter to mark the document as General Counsel's Exhibit 13 for identification, and herewith offer it in evidence as part of the formal file.

Trial Examiner: There being no objection, it is so marked and is received.

(The document referred to was marked General Counsel's Exhibit 13 and was received in evidence.)

Mr. Karasick: As a result of an off the record discussion, Mr. Examiner, counsel for the respondent-employer and [19] counsel for the respondent-

union and counsel for the General Counsel stipulate and agree with respect to the following facts concerning the business operations of the employer in this case.

The employer Olaa Sugar Company, Limited, an Hawaiian corporation, hereinafter called the respondent-employer, is engaged in growing and processing sugar cane on the Island of Hawaii;

The respondent-employer owns and cultivates 7,418 acres on this island and also secures sugar cane from a number of independent growers, whose acreage is 6,911, also located on this island; the respondent-employer produces in excess of \$6,000,000 in value of raw sugar and molasses per year. All of the sugar and substantially all of the molasses so produced is shipped to points located outside the Territory of Hawaii from the factory—from the respondent-employer's sugar mill located at Olaa.

Is that a correct statement, and do you so stipulate, Mr. Collins?

Mr. Collins: There is one thing that should be clarified with respect to that, Mr. Examiner, and that is the figure as to the amount of land that the company produces cane on does not represent the total land holding of the company but merely the land that is used for that purpose. Otherwise, the stipulation is satisfactory. [20]

* * * * *

Mr. Karasick: At this time, Mr. Examiner, I call Mr. Nelson West as an adverse witness for

cross-examination under Rule 43 (B) of the Federal Rules of Civil Procedure.

* * * * *

NELSON L. WEST

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): What is your official position with the Olaa Sugar Company, Limited?

A. I am assistant manager.

Q. And how long have you held that office, Mr. West? A. Since December 1, 1953.

Q. And prior to that, were you serving in any capacity with the employer, the respondent-employer here? A. Yes, I was.

Q. And in what capacity was that?

A. I was administrative assistant to the manager.

* * * * *

Q. How long have you been serving in one capacity or another with this particular employer?

A. Over 25 years.

Q. What was the position immediately prior to the position you held in 1951 with the company?

A. I was office manager. [22]

* * * * *

Mr. Karasick: As a result of an off the record discussion, Mr. Examiner, counsel for the respond-

(Testimony of Nelson L. West.)

ent-employer, counsel for the respondent-union and counsel for the General Counsel stipulate and agree that as a result of proceedings before the National Labor Relations Board entitled *Pepeekeo Sugar Company, et al.*, reported in 59 NLRB 1532, the union was certified as the collective bargaining representative of certain of the employees of the respondent-employer on March 22, 1945, that since that date the respondent union and the respondent-employer have for all or substantially all of that period been in contractual relationship with respect to collective bargaining covering various employees at the operation of the company located in Olaa.

Is it a correct statement and do you so stipulate, Mr. Collins?

Mr. Collins: Subject to verification of the dates and the NLRB citation number, we so stipulate and agree.

Mr. King: I will stipulate that is substantially correct, but would like to point out that the unit of the ILWU that was first certified was not the one of its present contract holder. There have been some changes by way of merger, consolidation, and so forth within the union itself.

Trial Examiner: Well, gentlemen, I heard the stipulation, and it is so stipulated. [23]

* * * * *

Mr. Karasick: I think that question may well be answered, Mr. Examiner, by the document I am next offering in evidence, which I have asked the

(Testimony of Nelson L. West.)

reporter to mark as General Counsel's Exhibit 14, for identification, and which I have previously submitted to counsel for their inspection.

This document is a printed document bearing on the cover the title "Agreement between Olaa Sugar Company, Ltd. and United Sugar Workers, ILWU, Local 142," and at the bottom the words "Effective September 1, 1951, as amended October 29, 1952." The document is a printed agreement consisting of 62 printed pages, with a table of contents on the cover and an index in the rear.

I offer this document in evidence as General Counsel's Exhibit 14.

Mr. King: No objection.

Mr. Collins: No objection.

Trial Examiner: There being no objection, the document is received and shall be marked "General Counsel's Exhibit No. 14 in evidence." [24]

(The document referred to was marked General Counsel's Exhibit No. 14 and was received in evidence.)

[See page 296.]

Q. (By Mr. Karasick): Mr. West, you know Favorito P. Banez, do you not?

A. Yes, I do.

Q. He previously worked for the company in various capacities, did he not? A. He did.

Q. From 1946 until December 17, 1953, is that correct? A. That's correct.

Q. And he was covered by the terms of the contract, which is General Counsel's Exhibit 14,

(Testimony of Nelson L. West.)

was he not, during the period of his employment by the company? A. Yes, he was.

Q. Am I correct that his last position with the company immediately preceding his discharge was that of senior cane truck driver?

A. That is correct. [25]

* * * * *

Q. Banez was not a member of the union at the time of his discharge, was he?

A. I don't know.

Q. Had you heard at any time whether or not he was?

A. Yes, I had heard that he was not, sometime in October, 1953.

Q. Was that the time that Mr. Arakaki had come in with a group of employees and presented a grievance against Banez?

A. That was the occasion, yes. [27]

Q. And they presented that grievance to you?

A. To the manager, Mr. Burns.

* * * * *

Q. Do you remember the date that the union actually did have the meeting with Mr. Burns?

A. October 19, I think.

* * * * *

Q. That was the time that Arakaki and the committee came in, is that right?

A. That is correct. [28]

* * * * *

Q. (By Mr. Karasick): Did Mr. Burns, before October 19,—I think you have already testified to

(Testimony of Nelson L. West.)

this,—tell you that he had heard that the union had a grievance against Banez or were about to present a formal grievance against Banez?

A. I was informed by Mr. Burns that the union had requested a meeting with him to discuss a problem. I don't recollect whether he knew at that time whether it was Banez or what problem it was. It was just a request for a meeting, that I knew about.

* * * * *

Q. You were present at that meeting?

A. I was present, yes.

Q. And did Mr. Arakaki present the grievance on behalf of the union?

A. I don't recollect whether he presented it on behalf of [29] the union; he did have something to say in the meeting.

Q. In support of the grievance?

A. In support of the grievance, yes.

* * * * *

Q. Now, the grievance presented at this meeting on October 19, 1953, was based on alleged violation of Section 1 of the contract which is General Counsel's Exhibit 14, was it not? And I call your attention specifically to that part of the section which occupies the last two paragraphs on page 2 of the printed copy.

A. That is correct.

Q. As a result of that grievance being filed by the union [30] against Banez, the Company discharged Banez on December 17, 1953, is that right?

(Testimony of Nelson L. West.)

A. As a result of that meeting, yes.

* * * * *

Mr. Karasick: As a result of an off the record discussion, Mr. Examiner, counsel for the respondent-employer, counsel for the respondent-union and counsel for General Counsel stipulate and agree that on December 17, 1953, and on January 7, 1954, letters were sent from the company over the signature of Mr. C. E. S. Burns, Jr., manager, to the complainant Banez with respect to the termination of Banez on December 17, 1953, setting forth the company's reasons with respect to the discharge of Banez, and that these letters I am offering in evidence and have asked the reporter to mark as General Counsel's Exhibit 15 for identification, being the letter referred to of December 17, 1953, and General Counsel's Exhibit 16 for identification, being the letter referred to as January 7, 1954. I herewith offer these documents in evidence.

Trial Examiner: There being no objection, the documents are received.

(The documents referred to were marked General Counsel's Exhibits 15 and 16 for identification and were received in evidence.) [31]

* * * * * [See page 301.]

Mr. Karasick: At this time I call Mr. Arakaki as an adverse witness, for cross-examination, under the same rule.

YASUKI ARAKAKI

was called as a witness by the General Counsel and being duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Karasick): Mr. Arakaki, you are a member of the executive board of the union, are you not? A. Yes.

Q. Is that the executive board of Local 142?

A. Yes.

Q. Of the ILWU? A. Yes.

Q. And in December 1952, the time we are interested in with respect to Banez's discharge, you were a trustee of the——

Mr. King: 1952?

Mr. Karasick: 1953. I beg your pardon.

Q. You were a trustee of the local, were you not?

A. Yes.

Q. You know Favorito P. Banez, the complainant here, do you not? A. I do.

Q. And you know that he worked for a period of years for Olaa Sugar Company, in various capacities? A. Yes, I do.

Q. From 1946 until he was discharged on December 17, 1953, is that right? A. Yes, I do.

Mr. King: Speak up, Mr. Arakaki.

Q. (By Mr. Karasick): In the early years Banez was a member of the union and authorized it in writing to check off, authorized the company in writing, to check off union dues for him each month, is that correct? A. That is correct.

(Testimony of Yasuki Arakaki.)

Q. And then in April 1952 he did not sign a new authorization check off authorization and the company no longer checked off his dues and gave them to the union, is that right?

A. I cannot remember the specific date just the way you have asked me.

Q. I see. Well, was it 1952, Mr. Arakaki, irrespective of the month that that happened?

A. I can't remember.

Q. You don't remember the year. It is true that for some [36] time prior to his discharge Banez was not a member of the union, is it not?

A. That I know; he was not.

Q. That he was not a member of the union, is that correct? A. Correct.

Q. On October 19, 1953, you accompanied by a committee from the union presented a grievance to Mr. Burns and Mr. West against Banez, alleging that Banez had violated Section 1 of the contract between the union and the company, did you not?

A. Nobody accompanied me; I accompanied them.

Q. You accompanied them?

A. I am one of the members of the grievance committee.

Q. I see. And you came in with the grievance committee and from time to time you spoke on behalf of the union's position in the matter, is that right? A. On Banez's matter?

(Testimony of Yasuki Arakaki.)

Q. No. You talked on behalf of the union's position with respect to Banez? A. Yes.

Q. And the union's position was that he had violated section 1 of the contract between the company and the union, is that not right?

A. Will you repeat that again, please?

Q. Yes. The union's position was that Banez had violated section 1 of the contract between the company and the union, [37] is that not right?

A. Correct.

Q. And by section 1, the union's position specifically referred to the last two printed paragraphs on page 2 of General Counsel's Exhibit 14, is that right? A. Correct.

Q. Following the presentation of that grievance, the company, on December 17, 1953, discharged Banez, did they not?

A. I can't remember the date.

Q. It was sometime after the grievance was presented, though, that the company discharged Banez; right? A. Yes.

Q. And to the best of your knowledge, from that date, whatever the date was, he was discharged, to the present date, he has not again worked for the respondent-employer, is that right?

A. That's correct. [38]

* * * * *

Cross Examination

Q. (By Mr. King): I show you the General Counsel's Exhibit 14, section 1, Mr. Arakaki. Here's the eighth paragraph. You have already testified

(Testimony of Yasuki Arakaki.)

it was under that particular portion of the contract that this meeting was held with the company. Right? A. Correct.

Q. And what portion, what is the language there that concerns the grievance committee meeting with the company so far as Banez was concerned?

A. In order to explain the section of this contract, I may have to go back to the intent of the agreement here. That's the way we apply in the plantation level and the cause, the reason why we have this here.

Trial Examiner: Just a minute.

Mr. Karasick: I am willing to stipulate with counsel. I think the witness might have a little difficulty in understanding the purport of the question. If I understand it correctly, after conferring a moment with counsel, I am willing to stipulate with counsel for the respondent-union that the clause relied upon by the union here with respect to the grievance against Banez and his discharge was the clause in [39] the contract, section 1, paragraph 8, which states that a disrupting of harmonious working relations may be the basis for a grievance filed by the union with the company.

Do you accept that stipulation?

Mr. King: Yes, I will agree to that. [40]

* * * * *

Mr. Collins: May the record show, Mr. Examiner, that the company has not entered into that stipulation. [42]

* * * * *

(Testimony of Yasuki Arakaki.)

Trial Examiner: All right. As between the company and [43] the union, as to the stipulation as to the union's position, the stipulation is accepted, and of course it is binding on those parties who participate in the stipulation, the union and the General Counsel. All right. [44]

* * * * *

Q. (By Mr. King): Mr. Arakaki, directing your attention to October 19th or thereabouts, 1953, you testified that you were with a group of union members who had a meeting with the company in this case. Right? A. Correct.

* * * * *

Q. (By Mr. King): And you have already testified, or there is a stipulation, that the matter was about Mr. Banez and his alleged disruption of harmonious working relations. Right?

A. Correct. [57]

* * * * *

Q. (By Mr. King): What did the union say to the company about this particular matter? And did you say it, or who spoke on behalf of the union?

A. With the best of my recollection, the person who spoke for the union was Brother Francisco La Torre.

Q. That is L-a T-o-r-r-e?

A. Correct. He was at that time one of the vice chairmen of the unit. I have participated in the discussion, and with the best of my recollection this is what we brought before the employer committee. That for many years—— [58]

(Testimony of Yasuki Arakaki.)

* * * * *

Q. Who else was there representing the union?

A. You want to know the composition of the committee?

Q. Yes. Yes, please.

A. To the best of my recollection it was Brother Macaysa.

Q. (By Mr. King): M-a-c-a-y-s-a? Is that right?

A. Yes. Correct. Brother Gallado, Brother Omuro, Brother Shirasaki, Brother Batamalome.

Q. (By Trial Examiner): Now, were they the principal members of the committee?

A. Correct.

Q. Who was the spokesman for the committee?

A. Brother La Torre.

Q. And did you also do some speaking for the committee? A. Correct.

Q. Who represented the company?

A. I think the company committee present at that time were Mr. Burns, Mr. West, Mr. Isherwood. There may be one or two others I can't recall.

Q. Now, let me ask you this. When you sat down there, I take it there came a time when you mentioned this Banez. Is that right?

A. Correct.

Q. Did there come a time when you mentioned him? A. Correct.

Q. All right. Who of the union was the spokesman when you reached that point? Who was speaking for the union? A. Brother La Torre.

(Testimony of Yasuki Arakaki.)

Q. And what did Brother La Torre say to management concerning Banez at that time?

A. We call attention to the company that Banez was creating [60] suspicion and hatred between nationality groups, namely, Filipino over Japanese, and recited to the company of the many occurrence, and after the explanation the company said they will take under advisement. And we adjourned that meeting.

Q. (By Mr. King): All right. Now, Mr. Arakaki, just for the record, about how many union members altogether were there? Altogether. Those you named. You said there were some others. How many altogether?

A. In the neighborhood of 20. * * * * * [61]

Mr. Karasick: Mr. Examiner, as a result of an off-the-record discussion it is hereby stipulated and agreed between counsel for the respondent employer, counsel for the respondent union, and counsel for the General Counsel that Favorito P. Banez, the complainant in this case, was not a union member at the time of his discharge on December 17, 1953, and for some period prior thereto.

Is that a correct statement, gentlemen, and do you so stipulate?

Mr. Collins: I am not exactly sure that we can enter into that stipulation, Mr. Examiner. I think we might phrase it this way. That we are willing to stipulate that on or about October 19, 1953, at the meeting that has been heretofore testified to, representations were made by the union to the company

(Testimony of Yasuki Arakaki.)

that this man was not a union employee, and to the best of our knowledge and belief that situation continued to the time of his discharge.

Mr. Karasick: I will accept the statement of counsel as the stipulation proposed instead of mine. Is that agreeable with you?

Mr. King: That's agreeable with me. [64]

Trial Examiner: All right. It is so stipulated.

* * * * *

CALEB E. S. BURNS, JR.

was thereupon called as a witness by and on behalf of the respondent employer, and being first duly sworn, was examined and testified as follows:

Direct Examination * * * * *

Q. (By Mr. Collins): What is your business or occupation? [65]

A. Manager of Olaa Sugar Company.

Q. How long have you occupied that position?

A. Since January, 1951. [66]

Mr. Collins: I now offer for identification a general map of the terrain of the Olaa Sugar Company, Limited, Puna, Hawaii, and ask that it be marked Exhibit 2-A. [67]

Trial Examiner: There being no objection, the document will be received for the same purpose as the others, and shall be marked Employer's Exhibit 2-A.

(The document referred to was marked Employer's Exhibit 2-A and was received in evidence.)

Q. (By Mr. Collins): Now, Mr. Burns, Exhibit

(Testimony of Caleb E. S. Burns, Jr.)

2-A bears the date down in the corner of 8-41. Does that substantially represent the plantation's sugar producing lands at the present time or in 1953?

A. Yes. Approximately so.

Q. There appears to be a railroad line starting at Hilo, running down to the mill camp, then spreading in the direction towards the Volcano, and also a line running down into the portion called Kapoho, with branch lines running off it. Does that railroad still exist? A. No, it does not.

Q. What is the status of the railroad?

A. The railroad has been eliminated as a means of hauling cane and sugar from the Olaa operation prior to my coming to Olaa.

Q. Is any of the property or the roadbed upon which the railroad formerly ran, is that being used by the plantation?

A. Yes, it is. A large part of the roadbed that was formerly railroad-bed is now used as roads for trucking of cane.

Q. Is it fair to say that all of the roadbed in the section [68] representing the fields outlined in green, that the roadbed running through those sections are presently roads?

A. Yes. That is true.

Q. And the roadbed that runs from the Kapoho section up to the Olaa mill is also a road, is that correct? A. That is correct. [69]

* * * * *

Q. Would you explain what the situation is

(Testimony of Caleb E. S. Burns, Jr.)

with respect to the lands that intervene between these various fields?

A. The lands that are between the areas which are in cultivation are largely lands made up of lava waste, some of them have some forest growth on them but in general they are not suited to agriculture, hence they have not been cultivated.

Q. Is it fair to say that to the extent that the soil conditions warrant it that these fields are as contiguous as possible? A. That is true.

Q. Now, you have said that the portions that are shaded represent planters cane. I believe we had a stipulation this morning, but I wonder if you have the figures right [72] there indicating how many planters there are furnishing sugar for your mill and also what the acreage of their cultivated land is?

A. We have 438 independent growers and they farm 6,911 acres.

Q. And how does that contrast with the holdings of the plantation?

A. The plantation farms 7,418 acres.

Q. I wonder if you would explain for the benefit of the Trial Examiner just what the operations of a sugar plantation are, speaking very generally?

A. Do you first wish the table of organization?

Q. No. I am referring to any sugar plantation.

A. The primary operation or the important part of any sugar plantation is, of course, the farming aspect of it, the growing, cultivation, fertilizing, weed control operation, connected with growing the

(Testimony of Caleb E. S. Burns, Jr.)

crop. Then the next step is the harvesting of the crop. And in terms of sequence of operation would be the transportation of the raw cane to the factory, at which time the cane is processed into, in our case, brown sugar and molasses. It requires the laundering of cane under some conditions. Actually, in 1953 we were not in that operation. Cane was brought into the mill, ground, or juice expressed, and the juice is then boiled, and from that process you get a sugar which, in our case, is brown sugar. It is not for [73] consumption but is shipped to the refinery in California. Most of it goes to the California refinery. The molasses is sold also on the Coast. There is a small amount sold locally, but general that is the plantation operation.

Q. When you speak of the "factory," you mean the mill? A. I mean the mill.

Q. It is true, is it not, that the product which emanates from the mill is not a commercial product in the sense it is sold on the wholesale or retail market?

A. That is true. Our brown sugar is sometimes, a part of our brown sugar output is sold on the New York market as raw sugar.

Q. Is the brown sugar that is manufactured, if I may use that term, out of your milling operations, the commercial brown sugar that we buy in the stores? A. No, it is not.

Q. Does it require a further refining process?

A. It does.

Q. And the white sugar?

(Testimony of Caleb E. S. Burns, Jr.)

A. That is also the result of further refining of the brown sugar.

Q. Which refining does not take place here?

A. That is correct.

Q. Now, you mentioned the fact that you have a large portion of the acreage from which you derive cane for your mill [74] being acreage that is cultivated by independent planters. Will you explain to the Trial Examiner just what the relationship is between the planters and the plantation and the general background of the relationship?

A. The relationship of grower to the company is apparently or apparently dates back to the start of the company in the early 1900s, 1901, 1902. Apparently the company encouraged its employees to grow sugar cane on the side, not only to aid them in increasing their own income but also to give the company more sugar cane to process. The relationship between the grower and the company changed during the years, of course, and during the period 1936 to about 1951 the growers were classified as adherent planters, a term used under the Sugar Act. In early 1951 their status was changed from that of adherent planter to one of an independent status. Under that change the grower actually assumed more the responsibilities of being an independent farmer. And that is the present relationship that we have with the grower.

Under the terms of our present agreement with them, cane or we take possession of the cane in the field. There are two types of contract. One, mechan-

(Testimony of Caleb E. S. Burns, Jr.)

ical, where we take possession of the cane at the moment harvesting takes place, and the hand-harvesting contract, where we take possession of the cane after it is cut and piled in the field.

Q. Has there been any factor over the years that has mitigated [75] against the plantation acquiring the land from these adherent or independent planters?

A. Yes. During the period of the adherent planter relationship one of the regulations that the Sugar Act operated under was that the ratio of administration to planters cane could not change. In other words, the company could not go on and increase its area under cultivation at the expense of the grower. So under the terms of the Sugar Act and the benefit payments which we obtain we were compelled to adhere to that sort of an arrangement. I do not think it is written in the Act but it is one of the administrative rulings that existed. Now, under the independent status of the growers, that specific rule does not appear. But, on the other hand, the land which we own and lease to growers, which makes up a fairly sizeable area of the planter land, on those lands we are specifically barred from taking them back into cultivation for our own purposes during the term of the lease that we have with the grower.

Q. What was the harvesting operation or the schedule or the plan that was followed in 1953 and prior years, so far as your company was concerned, if you can tell us very briefly?

(Testimony of Caleb E. S. Burns, Jr.)

A. The harvesting schedule is formulated each year on the basis primarily of age of crop. In other words, we attempt to keep our age of harvest at about 24 months. So consequently, fields that were harvested in 1951, in order 1, 2, 3, [76] will probably be harvested in 1953, in the same order. In other words, two years later they would come off in about the same order.

Planter and plantation fields were harvested on the same basis. That is, we attempted to keep about the same age of crop, not only for the planter but for the plantation. Consequently, harvest schedules set up early in the year were fairly well adhered to. We do make some changes in them, depending upon whether we want to plant certain fields, and so forth. But in general age is the main criteria for establishing our harvesting schedule.

Q. Is any agreement worked out with the individual planter as to when his crop will be harvested or is it a matter of general over-all scheduling of the operation?

A. It is a matter of general over-all harvesting operations that dictate whether planter A gets his cane cut now or some time later.

Q. But I am correct in assuming, am I, that approximately half of the cane land under cultivation at any particular time will be harvested within a given year? A. That is correct.

Q. Would you tell us now what method of harvesting was used in 1953?

A. In 1953 we were practically 100 percent hand

(Testimony of Caleb E. S. Burns, Jr.)

harvesting. By that I mean that all the cane, both planter and plantation, [77] that was harvested, was cut by hand, piled into piles, and then loaded into trucks.

The harvesting operation consisted of men going into the field with cane knives or machettes and cutting cane, throwing it into heap piles on cable slings, and that actually was the cutting or that phase of the harvesting operation. Men averaged slightly in excess of 5 tons, net tons, of cane per day. They cut the cane into piles that averaged about a ton and a quarter and cut the cane on slings, cable slings, so that after a pile of cane was cut on two slings, then they just cinched up the two ends of the slings and had a bundle there. That was the primary part of the cutting phase of the harvesting operation.

Then the next step was the loading part of it, where traveling cranes came along and had a long cable and either through the use of manpower or a little power tractor, this hook was dragged to the bundles of cane and then the loading machine in turn dragged these bundles back to the roadside and loaded them into the trucks, which were waiting at the time the loading operation was taking place.

Q. When you speak of roadside, do you mean public roads or plantation roads?

A. No. Plantation roads. I may say this: that Olaa Sugar Company has about 340 odd miles of roadway of its own, and there is about 106 miles of roadway which is in planter areas, [78] over which

(Testimony of Caleb E. S. Burns, Jr.)

we have the right to go and come. Or a total of about 450 miles of roadway in the 14,300 acres of cane land.

Now, the harvesting operation is such that all of the cane is loaded on these plantation field roads. None of the cane is loaded on public highway.

Q. The roads that you speak of, are they shown on either Exhibit 2-A or on Exhibit 3?

A. On Exhibit 2-A about the only roads that are shown are the old railroad-bed, from which the rails have been picked up.

Q. Are any of the public roads charted on that map?

A. Yes. The public roads are in general the dark blue lines which go through the area.

Q. Then, would it be correct to say that all roads shown on Exhibit 2-A are public roads with the exception of roads that may have been converted from the old roadbed? A. Yes.

Q. Are these thinner line roads in the Olaa section public roads or plantation roads?

A. No. I am sorry. I would hesitate to say that all of those are public roads. Just looking at this, it looks as though one of these smaller blue lines might be a land ownership division. I think that the dark blue lines here certainly show the public highway. The old railroad lines are now plantation roads, with the exception of the railroad line that [79] goes to Hilo. That we do not use. But if we refer to 3-A, the public roads are shown, as well as are the plantation roads. And the maze of lines in here are

(Testimony of Caleb E. S. Burns, Jr.)

most all of them plantation roadways. It would be possible to show the Territory or County roads very easily on this map.

Q. Would you explain what the internal organization of your plantation is, as far as operational activity is concerned?

A. The organization of the plantation is made up of a manager, an assistant manager, which in our case also has under him certain departments. Our assistant manager has under his direct supervision the industrial engineering, industrial relations, the office, construction, and medical departments. Those are departments which report directly to him. In addition, we have a field superintendent, who is also under the assistant manager but nonetheless has department heads reporting to him.

Under the field superintendent is the harvesting department. Actually, under the harvesting department is where the transportation section falls.

The cultivation department, agriculture research, and one other service department, I believe it is the garage.

Then we have a factory superintendent. Under the factory superintendent is the entire mill operation.

That sort of gives you a picture of the organization.

Q. So that if we may summarize, you have a field operation, [80] a milling operation, and a third, which would be assorted services?

(Testimony of Caleb E. S. Burns, Jr.)

A. That is right. A combination of service departments.

Q. And if I understand your testimony correctly, the actual transportation of the harvested cane from the field to the mill is in your organization under a field superintendent?

A. That is correct.

Q. Now, could you give us any approximation of the distances that are involved in going from the fields to your mill? You have only one mill, is that correct?

A. That is correct.

Q. And would you locate that on Exhibit 2?

A. The mill is located in the lower area of the block which is the first block you run into on leaving Hilo, on the main Volcano road. The Olaa Village is shown on 2-A and the mill is very close to it.

Q. The green that has been drawn around the Olaa area appears to encompass the location where the mill is situated; does that mean that you have fields around your mill?

A. We have fields right around our mill; as a matter of fact, some of our fields, field boundaries, are the mill yard boundaries.

Q. Would you give us the approximate distances involved in, let us say, bringing the cane from the most remote point in the Olaa sector to the mill. Approximately how great is [81] the distance there?

A. It would be in the neighborhood of 12 miles one way.

Q. To Pahoa?

(Testimony of Caleb E. S. Burns, Jr.)

A. I am speaking now of the longest distance.

Q. Yes.

A. I am not speaking of the center of the locations now.

Q. Yes.

A. I presume the Pahoa area would be 12 or 14 miles.

Q. And going down farther, the assorted fields down there?

A. Actually, in the area shown on 2-A is Kamailei, Malama, in the lower area there. That is our longest haul. We actually have a 23-mile one-way haul in there. [82]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Karasick): Is it one building or more than one building? The mill proper?

A. The mill proper is one building.

Q. I see. Does it have appurtenant buildings that supply the mill with power, or anything else?

A. No. There is one very small building that is used as a welding shop, something like that, but that is very small.

Q. What is the total number of persons employed at the mill proper, as distinguished from operations in the field? [84]

* * * * *

Mr. Karasick: I think counsel is right and I will be glad to accept his suggestion. In these questions, then, should I inadvertently fail to mention it, Mr. Burns, will you keep in mind that I am referring to

(Testimony of Caleb E. S. Burns, Jr.)

the time of Banez's discharge in December 1953.

Q. (By Mr. Karasick): Now, with that in mind, can you give us the approximate total number of persons employed at the mill itself?

* * * * *

A. Approximately 170.

Q. (By Mr. Karasick): That included everyone, office employees, everyone else? [85]

A. No. That is strictly in the factory or milling operation and the service operations associated with the running of the mill.

Q. There are certain office procedures, I suppose, and office employees engaged in those procedures that are connected with mill operations; right?

A. Our general office procedure or office personnel handles all the office work. We have, as I recall, one clerk or timekeeper in the mill, who takes care of the mill end of it. We have a warehouse setup, of course, which is different again. I am speaking now strictly of the number of people involved in the milling operation and the mechanics and so forth associated with that.

Q. What we normally refer to in Board proceedings perhaps as maintenance employees, is that right?

A. I would presume so.

Q. Is that a fairly descriptive term?

A. I think so.

Q. Can you give us, then, the over-all total of all employees who would be engaged in work connected

(Testimony of Caleb E. S. Burns, Jr.)

with the mill, Mr. Burns, including field—other than field employees?

A. That is the figure I gave you. 170.

Q. I see. What sum of money would represent the valuation of the mill as of December 1953?

A. We had an insurance study made of the factory, and asked for an appraisal on the basis of building a new factory, [86] and as I recall that figure was somewhere between six and \$7,000,000. On the other hand, I think our mill stands us on our books now at about \$1,200,000, somewhere in that area.

Q. I take it that what you are saying is that the replacement value of the mill today, as of apparently December of last year—

A. Yes.

Q. —is approximately between \$6,000,000 and \$7,000,000?

A. That is correct.

* * * * *

Q. (By Mr. Karasick): Mr. Burns, you have corrected me to point out that there are 26 sugar mills located within the Territory of Hawaii, on the various islands of the Territory, [87] is that right?

A. That is correct.

Q. In our off-the-record discussion I think you pointed out to me that there are two plantations in the Territory that merely grow and produce the sugar cane but have the cane milled for them by some other company, is that right?

A. That is correct.

Q. What was the figure of total raw sugar produced by Olaa in 1953; do you have that figure?

(Testimony of Caleb E. S. Burns, Jr.)

A. The total production is 53,966, I believe. I have the actual figure here. The total production in 1953 was 55,967 tons of 96 degree sugar.

Q. You will have to bear with me, I am afraid, for my ignorance. Will you be good enough to explain to me and for the record what 96 degree sugar means?

A. 96 degree sugar is the purity of sugar. In other words, if it were 100 degrees, it would be absolutely pure sucrose, but we market a raw sugar and we calculate it back in terms of 96 degree sugar. So it is 96 percent of 100 percent, but you don't get 100 percent in any kind of white sugar either. But that is the ultimate.

Q. I see. Now this 55,967 represents tons, is that it?

A. Tons. Short tons. 2,000 pound tons.

Q. In total raw sugar production of the 26 mills of the Territory. Olaa stands where? Approximately sixth? [88]

A. About sixth. That is correct.

* * * * *

Q. (By Mr. Karasick): Mr. Burns, I think you have already indicated for the record the total sugar production of the respondent employer for the year 1953. May I ask you at this time what the total molasses production was for this same period of time?

A. I do not have the exact figure but it would run about a fourth of the sugar production in terms of tons of molasses.

Q. You testified previously with respect to the

(Testimony of Caleb E. S. Burns, Jr.)

independent growers who cultivate sugar cane which in turn is used by the company in processing sugar and becomes part of its total production, is that correct? A. That is correct.

Q. I hand you at this time a series of documents entitled variously "independent Grower's Agreement," which I have asked the reporter to mark as General Counsel's Exhibit 17-A for identification, stapled to which are the following: A [89] mimeographed document of 3 pages entitled "Olaa Sugar Company, Ltd. Temporary amendment to Independent Grower's Agreement," which I have asked the reporter to mark General Counsel's Exhibit 17-B for identification; a single printed sheet of green paper, printed on both sides, bearing the caption "Olaa Sugar Company, Ltd. Amendment to Independent Grower Agreement," which I have asked the reporter to mark General Counsel's Exhibit 17-C for identification; and, finally, a single sheet of white paper which bears the caption "Olaa Sugar Company, Ltd. Second Amendment to Independent Grower Agreement," all of which is in printing, which I have asked the reporter to mark as General Counsel's Exhibit 17-D for identification.

I now hand you these documents, Mr. Burns, and ask you if they represent the independent grower's agreement which were in force and effect between the Olaa Sugar Company and various independent growers during the year 1953?

A. Exhibit 17-A was in effect; 18-B was not in effect in 1953.

(Testimony of Caleb E. S. Burns, Jr.)

Q. Is it as of the present date? A. It is.

Q. For the year 1954 it has been in effect?

A. Yes. Actually, this was negotiated in 1953 but was not approved by the Department of Agriculture until 1954.

Q. With respect to the remaining two documents, were they in force and effect during the year 1953? [90]

* * * * *

A. Exhibit 17-C was in effect but 17-D was not.

Q. (By Mr. Karasick): Is Exhibit 17-D presently in effect? A. Yes, it is.

Q. How long has it been in effect?

A. Since January 1954.

Mr. Karasick: I offer these documents in evidence as General Counsel's Exhibits 17-A through D, inclusive.

Trial Examiner: Any objection?

Mr. Collins: No objection.

Mr. King: No objection.

Trial Examiner: There being no objection, the documents are received and shall be marked General Counsel's Exhibits 17-A through D, inclusive.

(The documents referred to were marked General Counsel's Exhibits 17-A, B, C, D, and were received in evidence.)

[See pages 302-306.]

Q. (By Mr. Karasick): Do I understand correctly, Mr. Burns, that the independent growers have title to their own land?

(Testimony of Caleb E. S. Burns, Jr.)

A. They have control of their own land; that is correct. [91]

Q. I am not so much interested in absolutes here as I am in the fact. The company does not control the ownership of the land on which the sugar cane is grown by these independent growers, is that right? A. I don't quite understand.

Q. Let me withdraw that question, then. Does the company own any of the land on which the independent growers grow sugar cane?

A. Yes, it does.

Q. And as to that land so owned, does the company lease it on a term of years to the growers?

A. That is correct.

Q. Is there a stipulated term of years normally followed? A. Yes.

Q. What is the normal period that the land is leased by the company to an independent grower?

A. Fifteen years is the term of the lease.

Q. Do you know offhand what approximate percentage of the total 6900 acres of independent grower's land represents land which is leased to the growers by the company? If not in percentage, then how much of the land?

A. I think approximately twenty-four- or 2500 acres is company owned land.

Q. And the rest is land owned by others than the company? A. That is correct. [92]

Q. The contract between the independent grower and the company to grow cane for the company is usually for a period of five years, is that correct?

(Testimony of Caleb E. S. Burns, Jr.)

A. No. The contracts are crop to crop, cane purchase agreements.

Q. I see. So then they are about 24-month contracts?

A. Approximately that, or crop to crop, depending on the age of the crop.

Q. I see. The independent grower pays for the seed cane, does he not? A. That is correct.

Q. He pays for the irrigation?

A. We do not have to irrigate.

Q. You don't have to? A. No.

Q. He pays for the cultivation services furnished by the company?

A. The company furnishes—I may say this. At Olaa the growers do practically all of their own cultivation. They do that work themselves.

Q. Are there some growers, however, who do not do their own cultivation, for which the company furnishes such service?

A. Our furnishing of services to planters is on such a small basis that there are no growers who depend upon us to do their work. It is only in an unusual circumstance that we [93] do any cultivation.

Q. So practically speaking, the company neither offers cultivation or irrigation services; that is taken care of by the independent growers, is that right? A. That is correct.

Q. And I think you have explained previously that there are two types of agreement as to harvesting: One, where the company does the harvesting,

(Testimony of Caleb E. S. Burns, Jr.)

and if I understood correctly, the other where the independent grower does the harvesting?

A. No. In 1953 the only harvesting that was done was done by hand. And the cutting and piling of cane was paid for by the grower, but we did that work.

Q. In other words, the company furnished the labor for the cutting of the cane and charged the proportion of that labor cost to the independent grower, as was represented by his cane production?

A. The entire cost of harvesting planter A's cane was borne by planter A.

Q. But the labor was furnished by the company through its own labor force, is that correct?

A. That is correct.

Q. And that consisted of the cane cutters and the truck employees that transported the cane—Well, the cane cutters only, wouldn't it?

A. That is correct. [94]

Q. And from that point on it became a company problem to transport it to the mill?

A. That is right.

Q. Is it correct that in all five fields which are shown on Employer's Exhibit 2-A the independent growers' fields and the company fields are intermingled, that is, there will be some independent growers' fields which will be in the midst of company fields, and vice versa?

A. That is correct.

Q. In other words, there is no solid block where all of the land for a great period is the company's

(Testimony of Caleb E. S. Burns, Jr.)

and all of the land, the rest of the land, is the growers'; there are places where the two are contiguous and the sections are broken up between them, is that right?

A. Yes, that is true. But in general company fields would average more than 60 acres per field. In other words, there would not be small 5 or 6 acre blocks of company land and planter land mingled up.

Q. Would that be true of the independent growers' land or would that vary? I am speaking of generally speaking.

A. We have 438 independent growers and they farm 6,900 acres, I believe it is. So you vary in size of independent grower holdings from an acre to 200 acres. But in general they average 12 or 15 acres. Probably closer to 10 acres, actually. [95]

* * * * *

Q. (By Mr. Karasick): Mr. Burns, I think in tracing the history of the independent grower, you indicated that former employees were encouraged to grow sugar cane. I think there might be an impression left in the record that seems to me to be not quite accurate, and I want to ask you this. All of the independent growers at the present time are not former employees of the company, are they?

A. No.

Q. Are some of them, do you know?

A. Some of them are employees now.

Q. Are employees now. A. That is correct.

Q. And some of them are not in any way, nor

(Testimony of Caleb E. S. Burns, Jr.)

have they ever been in any way, connected with the company, is that right? A. Yes.

Q. I believe you testified previously that by provisions of the contract with the independent grower, the company is barred from taking the land back, at least during the period of the lease with the grower. Is that correct?

A. That is right.

Q. That is as to land that the company holds title to, is that right? [97] A. That is right.

Q. So that certainly, to that extent at least, the independent grower is independent thoroughly of the company, is that right? A. Yes.

* * * * *

Q. (By Mr. Karasick): Now, Mr. Burns, I think you testified that there are about 340 miles of roadway of the company and [98] in addition 106 miles over independent growers' areas, over which you have right-of-way. A. That is right.

Q. These are roads which the company cuts approximately every 600 feet into the field to assist in the harvesting and transporting of the cane to the mill at harvest time, is that not correct?

A. That is right.

Q. Now, in addition to that, I think you indicated that the cane is loaded on these roads that are cut into the fields? A. That is right.

Q. They are not loaded on public highways, is that right? A. That is right.

Q. That would create, I suppose, a transportation problem during harvest times if the trucks

(Testimony of Caleb E. S. Burns, Jr.)

were to load from the sides of the road bearing on public highway, is that right?

A. That is correct.

Q. And there are fields which bear directly or join directly the public highway, is that right?

A. That is right. The public highways go through large areas of our cane lands. [99]

* * * * *

Q. (By Mr. Karasick): Directing your attention, Mr. Burns, to Employer's Exhibit 2-A. **From** the farthest extremity of any land which the company either owns and cultivates or which it secures cane from independent growers, how far would it be by public road to the mill? In other words, how far at the farthest could you go from the Olaa mill to the outermost point of fields either owned by the company or from which the company secures sugar cane, remaining on public roads?

A. Approximately 23 miles.

Q. That would be in the straightest line, I take it?

A. It would be on roadways which would allow us to haul cane on.

Q. Yes. A. Yes.

Q. And a cane truck driver might at a point some 23 miles away from the mill pick up cane and by reason of routing take a trip longer than 23 miles before he reached the Olaa mill?

A. No. That is just about the maximum.

Q. About the maximum?

A. That is correct.

(Testimony of Caleb E. S. Burns, Jr.)

Q. Now, the truck drivers at the company in 1953 were [101] under the supervision of a truck dispatcher, is that correct?

A. That is correct.

Q. And that truck dispatcher supervised only truck drivers, no other classifications of employees, is that correct?

A. I think that is true in 1953. [102]

* * * * *

GEORGE MAIR

was called as a witness by and on behalf of Respondent Employer, and being first duly sworn, was examined and testified as follows: [106]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Collins): And what is your business or occupation, Mr. Mair?

A. Harvesting superintendent, Olaa Sugar Company.

Q. How long have you occupied that position?

A. Slightly over 3 years, about 3 years and 2 months.

Q. How long have you been with the company?

A. A little over 28 years.

Q. Has most of your time with the company been in the harvesting aspect of the operation?

A. I would call it the production aspect; in transportation for a great part of the time.

Q. For how long have you actually been in harvesting operations?

A. Slightly over 3 years.

(Testimony of George Mair.)

Q. Does the senior cane truck driver at Olaa plantation come within your jurisdiction?

A. That is correct.

Q. I show you a paper described "Job description. Olaa Sugar Company. Job title: Senior cane truck driver." And ask you whether that constitutes a description of the work of the senior cane truck driver at the plantation? [107]

A. Yes, I am familiar with this document.

Trial Examiner: It was stated here by someone that this Banez was a truck driver or cane truck driver. What was his position at the time of his discharge?

Mr. Collins: The official classification is "senior cane truck driver." [108]

* * * * *

Q. (By Mr. Collins): Mr. Mair, this document which has been marked for identification Respondent Employer's Exhibit 5, bears the date of June 9, 1952. Does that document contain a description of the job in question for the year 1953?

A. It does.

Q. There have not been any material changes in in the content of the job since June 1952 and up until December 1953?

A. That is correct.

Mr. Collins: I now offer it in evidence.

Mr. Karasick: No objection.

Trial Examiner: The document will be received and shall be marked the Employer's Exhibit No. 5 in evidence.

(Testimony of George Mair.)

(The document referred to was marked Employer's Exhibit No. 5 and was received in evidence.)

[See page 307.]

Q. (By Mr. Collins): Mr. Mair, who prepared this job description?

A. It originates with the immediate supervisor, who is the control dispatcher. Then it is checked by the industrial [109] relations department. If I may also add, with their assistance. And as head of the department, I approve it.

Q. Are these your initials down at the bottom?

A. That was the initial of the industrial relations director.

Q. I see. Now, I wonder if you would give us a general description of the way in which the sugar cane is harvested in the field?

A. The hand harvesting operation at Olaa was in 1953 divided into three groups, of approximately 120 to 130 men each, located in three different sections of the plantation. That is Mountain View, Olaa, and Puna. Each of these three sections was under the supervision of a harvesting overseer; he in turn had four or five gangs, consisting of approximately 30 or 35 men each. These gangs were transported to the field in the morning at starting time and disbursed along the field roads, which are approximately five- to 600 feet apart. The lines of growing or mature cane may be burned then or may have been burned the previous day prior to harvest.

Each man is assigned by his immediate super-

(Testimony of George Mair.)

visor five lines each, or a distance of 25 feet per man, as the lines are five feet apart. A sling distributor, truck-tractor, comes along and issues a number of slings to each cutter. These slings consist of quarter inch wire cable, 25 feet long, with a hook on each end. The individual cutter then gets a couple [110] of the slings and hauls them into the cane for a distance of approximately 20 or 30 feet. He then proceeds to cut the cane, all five lines, and deposits the sticks of cane which he cuts and tops onto these slings, to the end that he shall build a pile of approximately one and a quarter tons.

Q. Each man has his own pile?

A. Each man has his own pile and each pile will retain their identification for purpose of payment. When the pile has reached what in his estimation is one and a quarter tons, it should then be around 11 feet long and possibly around 4 feet high, maybe around 5 or 6 feet wide. If the cane stick is too long to meet these requirements, then he will possibly cut it in half and overlap them on the sling.

When the pile has what he considers reached the correct size, he will throw the slings on top, then engage the hooks, and that's that.

Then the next step is that he installs an identification mark on that pile of cane. The identification mark will consist of one, two, or three sticks of cane, with possibly a cane top leaf, as a marker. That is his identification mark for that pile of cane.

He then proceeds to the next step and repeats the performance across the field until quitting time or

(Testimony of George Mair.)

until he meets his neighbor coming from the opposite side of the road, in which case they will pick a fresh section. [111]

That pile of cane then remains until the loading operation commences. The loading operation, depending on the field supply, may take place immediately or it may take place during the night or even as much as 48 hours later that pile of cane may lie in the field.

However, the next step in harvesting is when the traveling crane comes along just inside the road. In other words, he is traveling in the field just off the road. And latches on to these piles of cane. This crane, of course, is attended by a truck which is traveling along the road waiting to be loaded. If the pile is close by, then two of what we call the ground crew or loading crew grab hold of the drag line from the crane, attach it to the hook, which the cutter has left open there, hoists that on board the truck.

When the bundles are farther away from the road, then the drag line is pulled back by a Fordson winch, a winch-equipped Fordson. The pile is then dragged, it may be as much as a maximum 300 feet, to the truck, loaded into the truck. The trucks we had in 1953 consisted of a semi-trailer and a full trailer with two compartments in each. They carried a total of from 16 to 18 of these piles, making a pay load of approximately 22 tons.

The loading crew on the crane is also in charge of a supervisor known as a loading foreman. He sits in

(Testimony of George Mair.)

the cab of the crane and he records the identification marks of the [112] cutters and gets an approximate weight from a recording unit.

When the loading operation is completed he hands these pieces of paper, what we call our weight slips, to the truck driver, the truck driver then proceeds on his way to the mill.

When the truck arrives at the mill, it is weighed on a Printomatic scale by the control dispatcher. The truck then proceeds to the nearest point of the cane carrier, where the truck is unloaded by slings, which are already in the truck, unloaded by a hammerhead crane. We call it an American crane.

That finishes the operation.

Q. Now, is the harvesting operation the same on plantation fields and planter fields?

A. Exactly.

Q. You say that when the cane is cut and deposited in the field on the sling, it is dragged from there to the roadside by the loading machine. Is that correct?

A. That's correct.

Q. Are your roads in the field so located that you can do that in the harvesting of any field?

A. Yes.

Q. What is the maximum distance between your field roads, do you know?

A. The maximum distance is in no case over 600 feet.

Q. And what is the average distance?

A. Slightly under 500; possibly 480 or 490. [113]

Q. If the field was being worked adjacent to a

(Testimony of George Mair.)

public road, will the loading take place on the public road or on the shoulder of the public road?

A. I tried to do that last year and the Territorial officials would not allow me to load on the public road. There are some possibilities that we could do just a little bit of it on the county roads but we very rarely have to. That is, our plantation roads are adequate in most cases.

* * * * *

Q. (By Trial Examiner Doyle): Is this a year round process that goes on, week by week, the year round? A. Yes.

Q. Harvesting?

A. We would like to have it nine months but we can't do it, haven't been able to do it for some years. It has been practically eleven months, with a brief shutdown period for mill overhaul and equipment overhaul.

Q. (By Mr. Collins): Is that due to the overhaul of your equipment or the mill equipment?

A. Both. [114]

Q. Do you recall for the year 1953 when the harvesting season started, your harvesting season started?

A. Yes; it was the first week in January.

Q. And when did it conclude?

A. Around the 17th of December; just before Christmas.

Q. And between those two dates it was a continuous process? A. That is correct.

Q. Does this harvesting operation, that is to say,

(Testimony of George Mair.)

the transportation of the cane that is cut, does that go around the clock or is it on daylight shifts?

A. Round the clock.

Q. How about the actual cutting of the cane?

A. Day shift only, 8 hours elapsed time.

Q. But enough cane is cut during the 8 hours to warrant the transportation on a 24-hour basis, is that right?

A. That is correct.

Q. I believe I asked you a question which is within your jurisdiction. The harvesting and the transportation of the sugar cane in these various sectors shown on Exhibit 2-A is all within your jurisdiction, is that correct?

A. That is correct. [115]

* * * * *

Q. (By Mr. Collins): Do you have any general pattern that is followed in connection with the routing of trucks in the harvesting of the various sectors?

A. Yes, we do have a predetermined practice.

Q. How are the trucks controlled?

A. They are controlled directly by the truck dispatcher. The routing of the trucks for a day, a shift, weight, is done by him by making up his schedule, which is posted each Saturday morning at a designated point, for the information of the truck drivers for the coming week. In other words, they know what their run is for the coming week.

Q. Does this schedule route the roads that they are to take?

(Testimony of George Mair.)

A. No, it does not. Simply where they are going, which section, which field, for the coming week.

Q. Are there any directions given to the truck drivers as [116] to what routes should be followed in working these various fields?

A. Yes, they are. They are given directly when the truck leaves the mill, leaves what we call the dispatcher's control shack.

Q. Are there any road markers, signs, lights, or anything similar, utilized for the same purpose?

A. Both. When the dispatcher gives an instruction to a driver, "Go to section so and so, road so and so, follow the arrows," the arrows and markers are placed by the Government roads leading into field roads.

Q. And do those markers or arrows or directions given indicate precisely what roads are to be taken to get to the field and what roads are to be taken to get from the field to the mill?

A. Yes, they do.

Q. In all instances are the, if we may use the term, in roads or the roads to the field and the out roads, the road to the mill, are they identical? That is to say, is it customary to go into the field and go out of the field on the same road?

A. Yes, usually.

Q. Will you refer to my earlier question? Taking Exhibit 2-A, will you indicate in general what the routing pattern is in working the various fields in the various sectors? [117]

A. It will take quite a while. O.K.

(Testimony of George Mair.)

Q. Let's start with the most remote one.

A. O.K. This marked here "Kaueleau" is our most remote. The truck would leave the mill and hit the Government road here.

Q. By "The Government road" you are referring to what road?

A. The dark blue line, right here.

Q. That is the one——

A. That is the one known as the Puna road.

Q. Puna road.

A. Hit the village of Pahoa and there we have a point known as the Kalapana Junction; then they take a secondary road, then we hit another point known as the Kamaili Junction. We go down there through the Kamaili cane until they hit this section here.

Q. By "This section" you are referring to what one, as designated?

A. Kaueleau. Do you want to break it down or——

Q. No. Let's talk just generally for a moment.

A. O.K. When he hits this point here, the driver will see an arrow.

Q. That is the point——

A. Still on the Government road.

Q. ——where the Kalapana road is joined by the road that goes to the Kaueleau, Kauaea, and Malama fields, is that correct? [118]

A. That is right. Then you will have an arrow here, and then you will have an intersection on the way down and there will be an arrow for his guid-

(Testimony of George Mair.)

ance. When he hits this point, there will be possibly several field roads adjoining this. This is still the Government road. The location, the exact location he is to go to, will be designated then by arrows.

Q. That is on the field roads?

A. On the field roads.

Q. By following these arrows onto the field roads, he hits the spot where the cane is actually to be loaded upon his truck. Now, is it customary for him to take the same road out, the same field road and the same public road?

A. No, it is not customary in that case. Our roads are all one-way roads and we try to avoid having trucks meet.

Q. Does that apply only with respect to your field roads or does it apply to your main highways as well?

A. We would like it to apply to main highways but we can't. The modern highway is usually wide enough for trucks meeting and passing; our field roads are not.

Q. When you are working those fields, do you make use of the road that formerly constituted the roadbed of the old railroad?

A. Not in this particular occasion, but when we go down to this point, which is known as lower Pahoa, when we go——

Q. That is Pahoa Village, is it?

A. When we go below Pahoa Village, yes, we would use that [119] road because that's downhill and it's a faster run. Then we will use this old rail-

(Testimony of George Mair.)

road. Then when we come down to the bottom of Kapoho, we will do the same thing, because this is a climb. Although this is a better road, it is a climb, and the elapsed time getting the load to the mill will be much faster by using the old railroad bed.

Q. So that you go down on the main highway and back on the old railroad bed, is that correct?

A. Correct.

Q. That is, where the fields are close to them?

A. That is right.

Q. What is the situation with respect to the Olaa-Mountain View area?

A. In nearly all cases we will go up the main road, the Government road. [120]

* * * * *

Q. (By Mr. Collins): I refer you now to Exhibit 3-A. I call your attention to the location of the mill and ask you whether in the harvesting of the fields adjacent to the mill, and I am referring now to the fields bearing these designations [121] on that exhibit, Field L, field K, field E, fields F and I, field G, field H, field C, C-2 and C-3, whether it is in conformity with your general routing practices to use any of the public roads at all.

A. In those fields we don't need them.

Q. And you do not use them; is that correct?

A. We don't use them. We may have to cross them, but that would be all. Not more than 20 feet.

Q. Let us get into the area now that involves fields Q, T, O, D, and J-2. To what extent would you be using the public roads on those fields?

(Testimony of George Mair.)

A. Possibly 10 percent of the mileage.

* * * * *

Q. (By Mr. Collins): As you get up into the Mountain View section—First, may I ask you, When Mountain View is referred to on Exhibit 3-A, where is that located on 3-A?

A. There is a dotted line marking the 13 Mile road. Approximately from then on out to the extreme left of the map is what we call Mountain View.

Q. When you are working the Mountain View section, do you use the public roads in harvesting that?

A. Yes, we do, for empty trucks going up. Field roads to [122] reach inside to whatever field we may happen to be harvesting in. Then we try to get back to the main road as quickly as possible. We usually come down about a couple of miles before we get back to it.

Q. Now, Mr. Mair,—

Mr. Karasick: I understand, Mr. Examiner, it is understood between counsel that the main road here as used by the witness refers to public road, as distinguished from the company road.

Mr. Collins: That is the Volcano Road there.

Trial Examiner: All right, it is so understood.

Q. (By Mr. Collins): Now, Mr. Mair, what sort of control do you have over your truck movements; is there any system of recording where the trucks are, when they arrive at what places, and so forth?

A. Yes, there is. We do it by radiotelephone.

(Testimony of George Mair.)

Q. Will you explain of just what that reporting consists, taking a movement of a truck from the mill to the field and back to the mill again.

A. When the truck is dispatched, he leaves the dispatch control shack.

Q. Where is that located?

A. That's located right in the mill yard. Proceeds to the field under instruction, follows the arrows to the traveling crane. When that truck reaches the field, the loading foreman, [123] who has a radio-telephone in the cab of the crane, reports to the dispatcher, "Truck Number so and so arrived in field." If there is no truck ahead of him, he will say, "Truck Number so and so arrived in field at 1:15, commenced loading 1:15." If there is a delay, "Commenced loading 1:20" or "1:25." As the case may be.

Q. From the telephone in the crane you get the information as to when the truck arrives and when the truck loading commences, is that correct?

A. That's correct. The next step in the reporting is when the truck is loaded and leaves, by the loading foreman to the dispatcher.

Q. And is there any further reporting on the way back?

A. It is usually not necessary unless there is a flat tire or some other unforeseen incident.

Q. Do you know whether records are kept by the truck dispatcher as to the various times of arrival and departure from the field and the time when the

(Testimony of George Mair.)

loading commences and is completed in the field on the various trucks?

A. We do have some such system. It is known as the truck dispatcher's log. All times are noted therein.

Q. Mr. Mair, I wonder if you could give us an estimate as to the amount of time that is required to complete a circuit of a loaded and unloaded truck from the mill to the field to the mill again from the various sectors that might be worked? [124] Let us start again with section that is the farthestest remote. How do you pronounce it?

A. Kamaili, Kauaeleau, Kauaea, Malama.

Q. That is it. Approximately how long does it take a truck from the time it leaves the mill, hits the field, and returns to the mill?

A. In the case of the extreme point, two and a half to three hours. The entire operation.

Q. What do you figure to be the normal running time with a full load of cane from that section back to the mill?

A. From that point in 1953 it took about an hour and a quarter to an hour and 40 minutes to make the run in. About 50 minutes to an hour going out.

Q. How about the Kapoho section?

A. That is quite comparable. It is almost the same, although the distance is slightly shorter. The route is harder if we use this road.

Q. By that road you are referring——

A. If we use the railroad, it is much less.

(Testimony of George Mair.)

Q. What would be the running time from Pahoa?

A. In both cases, upper and lower Pahoa, it would run from 55 to 60 minutes one way.

Q. And from the Mountain View section?

A. The Mountain View section, it would be less than that. Mountain View. An empty truck would hit the field in 25 to [125] 30 minutes. Return time about the same. Loading may take anywhere from half an hour to an hour.

Q. You say that all of the loading of the trucks takes place in the fields, that is to say, on the field road?

A. On the field road.

Q. From a glance at these maps it would appear that some of the fields are quite remote from the roads, that is from public roads, whereas others are adjacent to them. From your experience would you be able to give us any estimate as to—First of all, may I ask you, Can the trucks travel as fast on the plantation roads as they can on the public roads?

A. No, they can't.

Q. That is, the field roads?

A. No, they cannot.

Q. Could you give us any estimate as to about what the average time would be to run on the field road from the field to a public highway?

A. I will say a minimum of 5 minutes to possibly a maximum of 35 to 40, in extreme cases. These are two extremes.

Q. Yes. And the average would fall some place between those two figures, I take it?

(Testimony of George Mair.)

A. Right.

Q. Do your senior cane truck drivers normally operate any other trucks than cane trucks?

A. No. [126]

Q. How do you fill positions that may become vacant, as far as senior cane truck drivers are concerned?

A. When a vacancy occurs I am notified by the immediate supervisor of that department, who is the control dispatcher, that such vacancy exists. We have provision in our organization, the mechanics of which are an application form for additional personnel. This is filled out by the immediate supervisor, approved by myself, sent to the field superintendent, to the manager, to industrial relations for checking, then it is posted, conspicuously posted at various locations on the plantation that such job vacancy exists. It is posted for a certain length of time, at least a week, and all applications are considered as they are submitted.

Q. You mean applications from existing plantation personnel, is that correct?

A. From existing plantation personnel.

Q. And then what happens?

A. Then the driver is selected on the basis of ability, with due consideration given to seniority and all other relevant factors.

Q. And to the extent that you have personnel available on the plantation that may be able to fill the vacancy, that is the way it is filled, is that correct?

A. Yes.

(Testimony of George Mair.)

Q. You don't go off the plantation and get somebody as [127] long as somebody on the plantation can handle the job, is that correct?

A. That is correct.

Q. I notice in the job description that there is a term "Tomanaga hooks" under No. 5 beneath the caption "Work Performed." For the purpose of the record, would you explain what a Tomonaga hook is?

A. Tomonaga is the name of the man who invented those hooks, several years ago. It is a device attached to the end of a tag line or guide line which is put to the sling, clipped to the sling while the bundle is being hoisted from the ground to the truck. When the bundle is lowered into the truck it goes over the side and down out of sight and by a pull on the rope or the manila tag line these hooks relieve the big sling from the bundle of cane and are dragged out by the cane load.

Q. You are not referring to the slings that are used in the field? A. No.

Q. Where are these slings located?

A. The slings during this operation are around the bundle of cane.

Q. Well, they are not in the field; where are they?

A. They're around a bundle of cane.

Q. Where?

A. They were in the field until we started dragging them; [128] Then the ground crew attaches the Tomonaga hooks to the sling. The Tomonaga

(Testimony of George Mair.)

hooks are attached to a long rope line, thin rope, then are hoisted into the air, deposited into the truck, drop down into the correct position, the ground crewman then pulls this light line, the Tomonaga hooks are then automatically released from the slings which are around the bundle inside the truck.

* * * * *

Q. (By Mr. Collins): But this hook is attached to the sling that is used in the field, is that correct?

A. It is attached by the ground crewman during the—prior to the hoisting operation.

Q. When the sling is hooked up in the field, the Tomonaga [129] hook is not used at that time?

A. Oh, no.

Q. At what point does the Tomonaga hook come in contact with that sling?

A. Immediately prior to hooking on by the crane. After the dragging operation is completed, it is dragged to the roadside, the ground crew stands there. This Tomonaga hook with the rope attached is the only tool that he uses. This is a tool to be used as a tag line or a guide line to the bundle while it is in transit. Then it becomes an automatic release for the slings, which are now inside the truck. If you follow the operation.

Mr. Collins: No further questions.

Q. (By Trial Examiner Doyle): What kind of truck—You told us that you had trucks that the men drove, with a cab and trailer arrangement—are they?

(Testimony of George Mair.)

A. We have a truck tractor, semi-trailer, plus a full trailer. A train of three pieces.

Q. How big, what is the horsepower of these cabs, the tractor, how big a truck is this? Diesel?

A. We had 15 White gasoline trucks then and 6 GMC diesel trucks. The horsepower I am not sure of. I know they were 64 feet long overall, the frame, around 12 feet high, and 8 feet wide, 26 wheels overall.

Q. Twenty-six wheels? [130]

A. The entire train had 26 wheels.

Q. (By Mr. Collins): That is on three units?

A. Yes. Right.

Q. (By Trial Examiner Doyle): Was the same equipment, the same arrangement used whether it was driven on the public highway or on the grounds of the company? A. That's right.

Q. Was it your general proposition of routing that the trucks were loaded, of course, where the cane was cut, that then they took the closest or nearest route to the public highway, and then the public highway to the mill? Was that the custom?

A. That is correct.

Q. Making an allowance for another route for the trucks to come in, and I suppose a route for them to come out of where the cane was cut?

A. That is correct. [131]

* * * * *

Cross Examination

Q. (By Mr. Karasick): Mr. Mair, if I understand the picture correctly, approximately half of

(Testimony of George Mair.)

the land cultivated in sugar cane from which the company derives cane for processing is cultivated by independent growers. Do you know whether approximately half of the total sugar production of the company is represented by cane furnished by independent growers?

A. If you are thinking of sugar, I would say "Approximately, yes."

Q. I see. And with respect to molasses, would it be approximately that too?

A. Correct. In the same ratio.

Q. Yes. So that approximately half of the total production [135] of the company in terms of sugar and of molasses is derived from the cane supplied by independent growers; is that right?

A. That's right.

Q. I hand you, Mr. Mair, Employer's Exhibit No. 5, which is the job description of the senior cane truck driver, and direct your attention to item 5 on that exhibit, which indicates that one of the duties of the cane truck driver is to "unloosen sling hooks on cane bundles as required, helps with Tomonaga hooks, and removes empty slings from boom chain hooks." Do you know whether or not it is generally the ground crew or a member of the ground crew who performs those tasks, rather than the senior cane truck driver?

A. It is generally the duty of the ground crew and nearly so in every case. This No. 5 was inserted here for a reason. At one time it was a mutual agreement between the truck driver and the member

(Testimony of George Mair.)

of the ground crew to assist each other. For instance, the driver may have parked his truck on a down grade and while loading, for that reason, was unable to leave the cab. Consequently, at the completion of the loading, he was assisted by the member of the ground crew to trim the side of his truck with a cane knife, and in turn for that, when the ground crew were in a jam hauling a long or short place, he in turn would assist the ground crew member to handle those hooks.

Q. I see.

A. But it was rarely done. [136]

Q. So that the picture is that occasionally a truck driver may do this, but generally speaking that is a task of the ground crew; is that right?

A. That is correct.

Q. I see. I believe you testified yesterday, Mr. Mair, that last year you attempted to do some of the loading of cane onto the trucks on public roads but the Territorial officials would not allow you to do so. And I take it the reason they objected was that this formed an obstruction in the road or a possible obstruction along the side of the road that they preferred not to have there; is that right?

A. I do not think I meant last year; I referred to one specific instance which happened early this year on the new Territorial highway.

Q. I see.

A. And we had our engineer call the Territorial Office and ask for permission to load about seven or

(Testimony of George Mair.)

eight loads on the shoulder of the new highway. Permission refused.

Q. Is this a fair statement? Generally you do not attempt to load on the shoulders of public highways or on the public highways because it would perhaps result in some traffic hazard and it would be some sort of obstruction to the road if you did so? Is that right?

A. That is a correct statement. We do not want to.

Q. Yes. And so wherever possible, consistent with efficient [137] operation, you try to load in areas which are off the public highway, even though you later use the public highway for transportation purposes after loading is completed; is that correct?

A. That is correct.

Q. How many trucks and by "trucks" I mean trucks in which cane is loaded and transported from field to mill, did the company operate in December 1953?

A. In December 1933 we owned——

Q. 1953. A. 1953. We owned 19 trucks.

Q. Nineteen trucks?

A. But the trucks we operated, which I believe was your question, ran around eleven per shift.

Q. Did you operate any trucks you didn't own?

A. Not last year.

Q. That you leased or otherwise?

A. Not last year.

Q. Not last year? A. No.

Q. So your total of all trucks operated for cane

(Testimony of George Mair.)

loading and unloading purposes was nineteen, right?

A. Correct.

Q. Now, you recall that yesterday you gave us certain information in response to the Trial Examiner's question concerning [138] the capacity or size of these trucks. I wonder if you could tell us what the load capacity of the nineteen trucks was in December 1953, and if it varied, if you had different load capacities for different trucks, tell us what they were.

A. In all cases the bodies of these trucks were built to handle 24 tons pay load gross cane. We did not haul 24 tons. It became slightly illegal to do so. We actually averaged around 22.

Q. Twenty-two tons. Is this because of the weight, in terms of the public roads?

A. That is right.

Q. There are certain weight limits that are prescribed by authorities for a public road?

A. They have a weight formula, the Territorial Highway.

Q. I see. And it was for that reason that you limited your loads to 22 tons, to conform to the requirements of the law regarding weight, is that it?

A. That is correct.

Q. Oh, yes. How many truck drivers were employed by the company, cane truck drivers, during December 1953?

A. I believe it was around 33 at that time. That is more or less; it may be 32 or 34.

Q. All of the truck drivers at that time were

(Testimony of George Mair.)

under the supervision of the truck dispatcher; right? A. That's correct. [139]

Q. And he supervised only truck drivers, did he not? He didn't give directions or orders to any other classification of employee, did he?

A. He did in a small way. We have a weighing and stripping gang, who determine the tare by taking daily samples from each field.

Q. Now, for the purpose of the record, the tare is t-a-r-e, isn't it? A. Correct.

Q. And am I correct in understanding that represents the hanging down cane, the waste material, rocks and some vegetation and other things; is that right?

A. Last year it was cane tops, trash, and other extraneous matter.

Q. I see. A. There were no rocks then.

Q. Now, you say a truck dispatcher would give directions in a small way to this crew that would weigh this cane, did you say?

A. I didn't mean in a small way. A small group of people did that work. Six people.

Q. And they worked at the mill?

A. They worked in the mill yard.

Q. I see. And this was done when the cane arrived and was ready to be sent into the plant? [140]

A. That is correct.

Q. How many people were in that crew?

A. Six.

Q. Six. What do the truck dispatchers do in the

(Testimony of George Mair.)

way of giving them directions or orders, supervising them?

A. After he got the radio-telephone call from the field loading foreman that a certain truck contained a bundle of cane which was designated as a tare sample, he notified the crew chief verbally, the crew chief is in charge of these six men, "This truck has a tare sample." They in turn went through the process of having the crane remove it from the truck, take it to a designated location, first weigh it, haul it back to the stripping location, remove all the extraneous matter, and haul the net cane back again to the scale, weigh it, and find the difference, from gross into net.

Q. Actually, the crew chief I think you refer to is the supervisor and head of the tare gang, is that it, or this gang that checks for tare weight?

A. We do not call him a supervisor within the industry meaning of the word.

Q. He heads up the crew?

A. That is correct.

Q. Is that a better way of putting it?

A. That's correct.

Q. Other than the truck dispatcher telling the crew chief [141] about this load that is to come in so that he knows which load he is to check, does the truck dispatcher exercise any other direction or control over the crew, either the crew chief or anyone else?

A. He becomes their immediate supervisor.

Q. In what sense?

(Testimony of George Mair.)

A. Well, all the administrative work in connection with that gang. He can take charge of the time and handling vacations and other personnel matters.

Q. You mean that the truck dispatcher is the initial recommending person for approval of vacation time or times off for the tare crew, is that it? Do they go to him for approval initially for time off or for vacation?

A. That is correct.

Q. Outside of this group at the mill, does the truck dispatcher supervise any other employees other than the truck drivers themselves?

A. No. Not in 1953.

Q. And he didn't exercise any supervision, direction or control over anyone working in the field, or the ground crew, did he?

A. No.

Q. I think yesterday you told us that a job for a truck driving, vacancies for truck driving jobs, were posted and filled wherever possible from plantation personnel. That is [142] correct, is it not?

A. Right.

Q. Is it fair to say, Mr. Mair, that that is true to the extent possible with all jobs of the company, where possible you try to fill them from existing personnel, rather than go outside and seek others to fill the job?

A. That is our company policy and I believe generally industry policy.

Q. Now, when truck drivers, cane truck drivers, are not driving trucks, they will work either about the mill or assisting in the garage, working about

(Testimony of George Mair.)

the trucks with those mechanics who work on them, is that not right?

A. That sometimes happens.

Q. I hand you Employer's Exhibit 2-A, Mr. Mair, and direct your attention to the upper portion of that map or chart which is designated as the Mountain View-Olaa area, and ask you what the distances are from one end of the Volcano Road as marked on that map to the other end of the cultivated area?

A. Take it from here to here and from here to the end, about another 2 miles. I would say the total mileage is about 14 miles, lengthwise.

Q. Fourteen miles. I see. Do you happen to know what its greatest width is? Or don't you have that figure offhand?

A. Not offhand, but it is in no case more than 3 miles. [143]

Q. So it is a maximum of 3 miles in width and a length of approximately 14 miles, for that area, is that right?

A. Correct.

Q. I think the record already shows, does it not, that the approximate distance between the Mountain View-Olaa area of cultivated cane and the Pahoa area is some 12 to 14 miles, between fields, is that right?

A. Correct.

Trial Examiner: Is there a scale on that map, Mr. Karasick?

Mr. Karasick: No, I don't see one, Mr. Examiner. I beg your pardon. There is, yes. It may be that one could figure it out. I think it might be a

(Testimony of George Mair.)

little helpful to have the record show it for the Examiner and the Board.

Trial Examiner: I just wanted to know whether there was one or not, because there should be one on the map, and with the scale you can figure out any distance you want.

Q. (By Mr. Karasick): The cane cutting crew is the group that in December 1953 actually harvested the cane, that is, cut it and prepared it for transportation to the mill, is that right?

A. Correct.

Q. When that crew was not working at cutting cane, they would work in the fields, clearing in the fields, preparing them for new planting, and that sort of thing, is that right? [144]

A. That didn't happen in 1953 to any appreciable extent; and it can only happen when the mill is not grinding, in what we call our annual off-season for overhaul.

Q. I see. Now, during the annual off-season for over-haul, is it customary for the cane cutting crew to clean the smaller fields and work in the fields generally? A. They do cultivation work.

Q. I see. But they work in the fields?

A. In the fields.

Q. Is it correct to say, Mr. Mair, and again, all of the questions unless I indicate to the contrary are directed towards December 1953. I think you understand that, don't you, Mr. Mair?

A. Yes.

Q. Is it correct to say that the senior cane truck

(Testimony of George Mair.)

driver all or substantially all the time, in hauling cane from the field to the mill, would use public roads to a greater or less extent?

A. Not quite correct. There are many times and many occasions where we don't use public roads at all. A certain number of our fields.

Q. With the exception of the Mountain View-Olaa area, there is no area that you would normally reach in the various growing areas shown on Employer's Exhibit 2-A except through the use of public roads in one measure or another. Right? [145]

A. In the Pahoia, Kamaili areas we use the public roads part of the time in all cases.

Q. Yes.

A. And Olaa, Mountain View, many times we don't need them at all.

Q. Yes. I suppose upon, even in that area, where the field lies? A. It all depends——

Q. It might be a matter as simple as crossing the Volcano Road in that area to get across from field to field; right? A. Right.

Q. In other cases it might mean if you were, as shown on this map, if you were at the left extremity of that area, the cane driver might be using the Volcano Road going right into the mill; right?

A. That is correct.

Q. About half of the cane produced, I think you have indicated, has come from the fields of independent growers. Is it a fair estimate to say that about four hours a day or about half of the working day of the senior cane truck driver would be haul-

(Testimony of George Mair.)

ing cane of independent growers as distinguished from cane of the company?

A. I wouldn't put it quite that way. I would say that about half of the year there would be many days when we would be hauling plantation cane exclusively and other days we might [146] be hauling planter cane exclusively.

Q. I see. So that you would put it on the basis of an over-all annual average that approximately half the time is spent in hauling planters' cane, is about what it amounts to? Is that right?

A. Correct.

Q. Would it also be a fair statement to say that about some 70 percent of the cane truck driver's time was spent in driving on public rather than on company roads in the hauling of cane during a season, and by season I mean a period of your 11-month year?

A. No, sir, I wouldn't quite put it that way. In some cases it might, but very rarely. Would you mind if I just gave you a specific example?

Q. No, no. Any way that you can best answer the question.

A. Not an average. You take the area which you just mentioned, which is marked on Exhibit 2-A as Mountain View.

Q. Yes.

A. And another one which is marked, second from the bottom, as Pahoa.

Q. Yes.

A. In these two areas, times and distances are

(Testimony of George Mair.)

comparable for harvesting and cane hauling purposes.

Q. May I interrupt you for a moment here, sir? You say times and distances are comparable? [147]

A. Times and distance, yes.

Q. Now, I don't understand that.

A. Well, using either yardstick.

Q. Go on with your answer and maybe it will make itself clear.

A. To Pahoa or Mountain View, running on public road only in order to get access to the field road, the elapsed time both ways would be, say, one hour and ten minutes. I would apply that either to Pahoa or Mountain View.

Q. This would be elapsed time from what point to what point?

A. From the mill to the end of the public highway, where we enter the field road.

Q. Would one hour and ten minutes—round trip, is that right?

A. That's right; going and coming.

Q. I see.

A. In field travel on the road would be, actually traveling, driving the truck, the truck moving, about forty minutes. Inside the field during loading operation, where the truck would be standing still while the crane was loading it or moving anywhere from fifty feet to 300 feet, as the piles of cane required, would use up about fifty minutes. Therefore, the fifty minutes, plus the forty travel, would give us an elapsed time of about an hour

(Testimony of George Mair.)

and thirty minutes, in the field, for the round trip, including the loading operation. [148] The travel time on the public highway in this instance would be one hour and ten minutes.

Q. In terms of comparative distances, directing your attention to the Pahoa area, what is the length of that area in miles, approximately? As shown on this chart.

A. You refer to the area in cane?

Q. Yes, that's right.

A. Around five or six miles, from top to bottom.

Q. Running from left to right or right to left on this chart, is that right?

A. Right. The scale makes it five miles.

Q. Five miles. Measuring it with a pencil.

Q. All right. So that the field itself is at its greatest point five miles long, right?

A. That's right.

Q. As compared with the twelve to fourteen mile area, or twelve to fourteen mile distance on the public road between that field and the mill, is that right?

A. That's correct.

Q. I see. Now, again in light of what you have just told us, Mr. Mair, let me ask you if it is not a fair estimate to make that a cane truck driver during the period of time we are interested in would not on the average be spending approximately 72 percent of his time, say in the period of a month, average, in driving on public rather than company roads?

A. No, he wouldn't go that high. [149]

(Testimony of George Mair.)

Q. I see. What would you think would be a fair estimate, from your experience, Mr. Mair? Of the percentage of time spent on the average per month by the cane truck driver in December 1953 on driving on public, as distinguished from company roads?

A. It is rather hard to pick any particular month. I would like again to talk about the crop.

Q. Would you like to take the annual period?

A. I would rather talk about the crop.

Q. Surely. Use that as your—

A. (Interrupting): Take December 1953. We weren't on public roads at all. But annually I have always had 50-50 in mind.

Q. You think that a closer estimate would be 50 percent of the time spent on public—

A. (Interrupting): Oh, yes. It may not be strictly accurate but much closer than 70-30.

Q. It may be 60-40 but your best estimate is about 50-50, is that right? A. Correct.

Mr. Karasick: I think that is all.

Trial Examiner: Any further questions?

Redirect Examination

Q. (By Mr. Collins): Mr. Mair, in answer to a question asked by Mr. Karasick you indicated that when the cane truck drivers were not actually hauling cane that they might be [150] employed, if I understood you correctly, in the mill or in the garage; is that correct?

A. Yes. That is generally speaking correct.

Q. On the job description, Employer's Exhibit

(Testimony of George Mair.)

5-A, is there any specific reference to any mill work as being part of the cane truck driver's job?

A. It is generally covered by No. 10, where it says, "Does other work as directed by supervisor."

Q. But specifically there is reference to garage work, isn't there?

A. There is one specific reference. No. 9: "Assists motor mechanics in the capacity of helper while truck is being repaired."

Q. And isn't it true generally that when they are not driving trucks they are working in the garage?

A. Generally speaking, yes.

Q. And it would only be if there was no garage work available that they might be assigned some place else, is that correct?

A. It would happen, again, in an off-season, which I have referred to. Rarely during a grinding season.

Q. Now, you testified that your best estimate was that about 50 percent of the cane truck driver's time while driving, actually driving, would be on a public road, as opposed to private roads. Are you taking into consideration merely [151] the running time on both roads or are you taking into consideration the field time for loading in the field and for unloading at the mill when you make that estimate?

A. I used time, not miles.

Q. I don't know whether I make my question clear. Let us take it this way. The question was asked as to what your best estimate was as to the comparable time on the field roads and the public

(Testimony of George Mair.)

roads. Was it to that question, and with those facts only specifically in mind, that you gave your estimate of 50-50? A. That is correct.

Q. So that you were not in fact considering the amount of time that might be spent in the field by the truck driver in the loading operation itself and at the mill in the unloading operation?

A. I was considering the time spent in the field, but again I may not have given quite enough weight to the time spent at the mill. That was one in 1953 took considerable of the driver's time, due to slow unloading.

Q. Let me ask you this. Have you ever attempted to sit down and make a determination as to this respective time spent in both places, or is that something that you are merely endeavoring to put a figure to at this moment?

A. I am trying to do it right now. But the question has arisen from time to time and we have had an occasional spot check. [152]

Mr. Collins: I have no further questions.

Recross Examination

Q. (By Mr. Karasick): This question has arisen recently with respect to this case and there has been general discussion and consideration of the time element and distance element involved, is that not right?

A. That is correct. It is quite new to me right now.

Q. Yes. I understand that we are asking you

(Testimony of George Mair.)

to rather pinpoint a subject which is somewhat difficult for you to do.

If you were to eliminate the time the truck driver spent in the field on loading operation and the time he spent at the mill in unloading, would the figure of 50 percent spent on public roads be increased if we were to ask you how much of the time of the driver is spent on public roads and confined your yardstick in measuring that to the time spent only in travel? Do you understand the question?

A. I do. It probably could be increased slightly, naturally.

Q. Yes. You say that the driver spends a fairly substantial portion of his time in the field during loading. Right? A. Correct.

Q. And then he spends a fairly substantial portion of his time at the mill, unloading? Right?

A. Correct. [153]

Q. Subtracting that, using only the travel time alone, on company and on public roads, would it then be fair to say that you—that some 72 percent of the actual travel time of the truck driver during this period or during the annual period, if you prefer to use it, would be represented by travel on public rather than on company roads? Using only travel time as your yardstick.

A. It still sounds rather high. 72 percent. I wouldn't go that far.

Q. I see. A. But it would be increased.

* * * * *

(Testimony of George Mair.)

Q. (By Mr. Karasick): I want to again direct your question to only the time spent in travel.

A. Yes. You have already removed the loading and the unloading time?

Q. Right. Yes. [157]

A. Driving only; sitting behind the wheel and driving the truck?

Q. Right.

A. I will try not to guess; I will try to estimate. I will say, okay, then, around 60 percent.

Q. Around 60 percent on the public rather than on company roads. Is that right?

A. Actually driving the truck only.

Q. Yes. Now, would that figure of 60 percent be increased if you were to take, instead of driving time, mileages; would you say that over an annual period a truck driver drives so many miles and of the total miles he covered a certain percentage represents travel over public rather than company roads; would the figure remain the same or be different, in that case?

A. It would again be slightly increased, I believe.

Q. And approximately how much, from your knowledge and experience, would you say the figure should be?

A. That's a rather hard one.

Q. Do you want time to study that? I would be glad to have you defer the question. [158]

* * * * *

A. Your question was that if we use miles instead of [159] elapsed time, would the percentage

(Testimony of George Mair.)

of time on Government roads be increased? Is that correct?

Q. (By Mr. Karasick): Yes. I think you said it would. And then it was a question of whether you could give us a figure.

* * * * *

A. I will say that it could be slightly increased. I don't want to be specific on that one.

Q. Your best answer, and I don't want to prolong this, but your best answer would be "Something over 60 percent"—right?

A. Call it that, yes, sir.

* * * * *

ROBERT S. ANDERSON

was called as a witness by and on behalf of respondent employer, Olaa Sugar Company, and being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Collins): And what is your business or occupation?

A. Cost control engineer.

Q. For whom are you employed?

A. Olaa Sugar Company, Limited.

Q. How long have you held that position?

A. Seven months the 25th of August.

Q. And what was your occupation prior thereto?

A. I was a time study engineer with Libby, McNeil & Libby.

Q. Have you in the course of your time in the

(Testimony of Robert S. Anderson.)

employ of the Olaa Sugar Company computed certain figures from the books of the company concerning the number of traveling hours of trucks and other figures in connection therewith?

A. Yes, sir.

Mr. Collins: I ask this be marked for identification as the company's next exhibit in order.

(The document referred to was marked Employer's Exhibit 6 for identification.)

Q. (By Mr. Collins): I hand you Employer's Exhibit 6 for identification, and ask you if the figures represented there have been prepared on the basis of the work records of the company?

A. Yes, sir, they have. [161]

Mr. Collins: I offer this in evidence as Employer's Exhibit 6.

Mr. Karasick: No objection.

Trial Examiner: There being no objection, it is admitted and shall be designated Employer's Exhibit 6 in evidence.

(The document previously marked for identification Employer's Exhibit 6, was received in evidence.)

[See page 310.]

Q. (By Mr. Collins): Mr. Anderson, would you explain what the significance is of the first item "Total traveling hours of trucks"?

A. This 33,632 traveling hours is the record that is kept by shift by truck and filled out by the truck driver. He puts down the time that his truck is actually moving.

(Testimony of Robert S. Anderson.)

Q. And the next item "Total truck trips"?

A. 25,913 trips is also put on the form by the truck driver; at the completion of his shift he will put down how many trips he made to certain fields.

Q. Does that represent the figure for the year 1953? A. Yes, sir, it does.

Q. And the next item is a matter of mathematics, is that correct? A. Yes, sir, it is.

Q. In other words, you have divided the first item by the second item and then you secure the results of 78 minutes as the average traveling hours per truck trip, is that correct? [162]

A. Yes, sir.

Q. By truck trip, you refer to what; is that a complete circuit from mill to mill?

A. Yes, sir.

Q. This next item, "Average time from arrival of truck at field to completing of loading," of what does that item consist, Mr. Anderson?

A. That item consists of the time that the truck arrives at the field until the time it has completed loading and started back to the mill.

Q. And that is based upon what record?

A. That is based on a truck dispatch sheet.

Q. And how is the information on that sheet prepared?

A. In 1953 all of our fields that were loading cane, there was direct radio control with the loader loading the truck. And also there is a radio at the dispatch shack, and the dispatcher notes down the time on this sheet that the truck leaves the mill

(Testimony of Robert S. Anderson.)

yard; upon its arrival at the field, the checker and the loader uses the radio, he radios back what time the truck arrives at the field. He will also radio back what time the truck leaves the field.

Q. When it is completely loaded?

A. Yes, sir. The next item——

Q. The next item—78 minutes—is the same as the third item on the exhibit, is that correct? [163]

A. Yes, sir.

Q. The unloading time per trip of 18.11 minutes, what does that figure signify and how was it prepared?

A. That figure, again, is kept by the dispatcher. When the truck comes in to the scale, he puts down the time that the truck arrives; and then again he will put down the time that the truck leaves the mill and goes back to the field. And in that process of time the truck is unloading. So that elapsed time is the unloading time.

Q. Now, the next item of 2 hours 34.18 minutes is the average time of the complete trip; that is a matter of computation, is it not? A. Yes, sir.

Q. And what are the items that go into that computation?

A. The items on that are the time from arrival of the truck in the field to the completion of loading, the travel time per trip, and the unloading time per trip.

Q. And the balance of the exhibit are percentages taken from the figures previously shown, is that correct? A. Yes, sir.

(Testimony of Robert S. Anderson.)

Mr. Collins: No further questions.

Trial Examiner: Cross examination.

Cross Examination

Q. (By Mr. Karasick): Is my understanding of this exhibit correct, Mr. Anderson, that 50 per cent of the average time of the complete trip is the time spent in actual travel? [164]

A. Travel, yes.

Q. So that the average actual travel time of a truck driver during the year 1953 was slightly in excess of one and a quarter hours, according to this, is that right?

A. All over travel, both plantation and Government roads.

Q. Yes. But I am talking about travel time. Truck driver's average travel time, one way,—strike "one way." The average travel time of a truck driver during the year was one hour, slightly in excess of one hour and 15 minutes per trip. Right?

A. Per trip. Yes.

Mr. Karasick: Thank you. I have no further questions.

Q. (By Trial Examiner Doyle): According to this exhibit, at the bottom, the last item is "Percent of time in field loading and unloading, exclusive of transportation over farm roads." I take it from that it is meant for that length of time this truck driver is waiting around while someone else is loading and unloading the truck. Is that it?

(Testimony of Robert S. Anderson.)

Mr. Collins: As I understand it, the waiting may be for a number of reasons, in the field. But it is standby time, if I may use that term.

Trial Examiner: Standby time. It isn't that he is engaged in the loading or unloading or doing work in connection therewith. He is just sort of wasting time while others load and unload the truck?

Mr. Collins: Except to the limited extent that he may be [165] assisting the ground crew, that is correct.

Mr. Karasick: Is my understanding correct in this regard, to simplify the matter this way: That the truck driver besides driving the truck normally does nothing more after the truck is loaded than with a knife slashes off the ends of cane sticks sticking out so that they don't strike any objects or persons when the truck is being driven? Normally, that is true, isn't it?

Mr. Collins: I think normally that is correct. I think Mr. Mair has testified fully with respect to that. [166]

* * * * *

Recross Examination

Q. (By Mr. Karasick): Mr. Anderson, with respect to this last item on Employer's Exhibit No. 6, "Percent of time in field loading and unloading, exclusive of transportation over farm roads." That does not exclude the transportation over public roads, is that right?

(Testimony of Robert S. Anderson.)

A. No, that does — there is no travel time involved in that 49 percent at all.

Q. So really the description for that title could also be "Time spent by a truck driver in field from time of arrival to time of departure with load," is that right?

A. And also the time spent in the mill yard.

Q. From the time of arrival to the time of unloading? A. Yes.

Q. Is that right? A. Yes.

Q. That is what that title really or may be designated as, rather than the time you have, is that right?

A. This title here is perfectly correct also. [167]

Q. I am not quarreling with it; I am saying that the other is equally correct, is it not?

A. Yes.

* * * * *

Redirect Examination

Q. (By Mr. Collins): The amount of time that is computed in that figure does not involve the time when the truck actually goes off the Government road and hits the field until it leaves the field and hits the Government road?

A. That is right. That time is not included.

Q. Not all of that time is included, is that correct? A. Yes.

Q. That includes merely the time from the arrival at the loading point until departure at the loading point, am I right? A. That is right.

Mr. Karasick: Plus, I understand, Mr. Collins,

(Testimony of Robert S. Anderson.)

the time unloading—the time at the unloading point and the departure.

Mr. Collins: Yes.

Q. (By Mr. Karasick): Right?

A. Right. [168]

* * * * *

Mr. Collins: Mr. Examiner, during the recess agreement has been entered into between the parties for a stipulation to the following effect: That the senior cane truck driver had the labor grade 6, as appears in Exhibit B of the General Counsel's Exhibit 14, and as such his hourly rate of wages was \$1.28; that the cane cutters were employed on an incentive contract basis but they received a minimum guarantee comparable to the wages set out in labor grade 3, as appears in the same exhibit, under which labor grade the hourly rate of wage is specified to be \$1.105. This is the exhibit B to General Counsel's Exhibit 14, on page 49 thereof, at the bottom of which appears "As amended October 29, 1952."

Trial Examiner: So stipulated?

Mr. Karasick: So stipulated.

Mr. King: So stipulated.

Mr. Examiner, I call Severino Ramos.

SEVERINO RAMOS

a witness called by and on behalf of respondent union, ILWU Local 142, being first duly sworn, was examined and testified as follows:

* * * * *

(Testimony of Severino Ramos.)

Direct Examination [169]

* * * * *

Q. (By Mr. King): 8½ Mile camp. Do you know Favorito Banez? A. Yes.

Q. How long have you known him?

A. I have known him for over 4 years.

Q. Did you at any time live with Mr. Banez?

A. Yes.

Q. When was that? [170]

A. That was since 1942. Since 1950 he lived with me.

Q. About 1950? A. Yes, sir.

Q. What do you mean by living with him; live in the same house or what?

A. Live in the same house.

Q. You were house-mates, is that right?

A. That's right.

Q. And how long were you housemates?

A. For about 3 years.

Q. About 3 years? A. Yes.

Q. Now, directing your attention to about 1951, Mr. Ramos. Did you ever have occasion to have a conversation with Mr. Banez?

A. Yes, we have.

Q. Can you tell the Examiner what that conversation was about, what Mr. Banez said and what you said?

Mr. Karasick: Just a moment. I object [171]

* * * * *

Trial Examiner: I will sustain the objection.

* * * * *

(Testimony of Severino Ramos.)

This complaint alleges that there is this provision of the contract. I will accept proof as to how the discharge was [173] implemented by virtue of this provision. However, whether Banez had done what the union said he had done or not would be irrelevant to the issues framed by this complaint. So I am going to exclude any evidence as to the conduct of Banez prior to this conference of October 19th.

Now I will hear all your objections.

Mr. King: You have already ruled, Mr. Examiner. And for the record, may I make an offer of proof?

Trial Examiner: Yes.

Mr. King: We offer to prove through this witness, Mr. Ramos, that in 1951 he and Banez had a conversation in which Mr. Banez substantially said the following:

That he had campaigned with respect to the union shop question at Olaa Sugar Company at that time very hard to create dissension between the leaders, the rank and filers, and officers of the union, and that under a union shop the Filipinos would never have a chance;

We further offer to prove by this witness that Mr. Banez said the seniority provision of the union contract was good only for the Japanese and not for the Filipinos;

We offer to prove through this witness that on another occasion, somewhat before 1951, when Mr. Banez was involved in a matter for which he was disciplined by the company, something that hap-

(Testimony of Severino Ramos.)

pened on the job, Mr. Banez made like statements to this particular witness with respect to the Japanese and the union leadership being favored as against the Filipinos. [174]

That is all we have from this witness.

Mr. Karasick: To which offer of proof I hereby object.

Trial Examiner: And I will sustain the objection.

* * * * *

Mr. King: I would like to make an offer of proof at this time.

Trial Examiner: All right. I will permit you to make [175] your offer of proof. Just name the witness.

Mr. King: We offer to prove through Bonofacio Tapenio Matias that some time in August or September 1953 Mr. Matias was riding in an automobile to Kapoho with Mr. Banez, that Mr. Banez was not a union member at that time, wanted to go to Kapoho to speak to one Valorio, who was a union steward, to try to get Valorio to sponsor Banez to address a general union membership meeting of the union, at which he was going to speak on what he called "secrets of the union officers," having to do with what Banez termed were pro-Japanese and anti-Filipino actions of the union membership and the executive board of the unit; that this happened about one month before a so-called petition was circulated, allegedly by Banez and two other employ-

ees of the company, which called for such a general membership meeting.

That is the extent of that offer of proof.

Trial Examiner: Mr. Karasick, do you make the same objection?

* * * * *

Mr. Karasick: Thank you. To which offer of proof we object.

Trial Examiner: On the same grounds previously stated, I take it? [176]

Mr. Karasick: Yes, Mr. Examiner.

Trial Examiner: I will sustain the objection on the same basis as I sustained the previous objection to the same type of testimony.

Mr. King: I call Frank LaTore.

FRANCISCO LaTORE

a witness called by and on behalf of the respondent union, ILWU, Local 142, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. King): Where are you employed?

A. Olaa Sugar Company.

Q. And how long have you been employed by that company? A. About two years.

Q. Are you a member of the union in this case, the ILWU? A. Yes, sir.

Q. In 1953 you were also a member of the union?

A. Yes, sir.

(Testimony of Francisco LaTore.)

Q. Did you hold any position with the Olaa unit in 1953? A. Yes, sir.

Q. What was that position? [177]

A. Second vice-chairman.

Q. Now, Mr. LaTore, do you know Favorito Banez? A. I don't quite well know him.

Q. You are familiar with him; you know who he is, don't you? A. That's right.

* * * * *

Q. (By Mr. King): Did anything come to your attention, Mr. LaTore, in the latter part of 1953, as a unit official, with respect to Mr. Banez?

A. Yes, sir.

Q. What was that? [178]

* * * * *

A. That was the circulation of a petition. [179]

Q. (By Mr. King): Can you explain in a little more detail what you mean by that?

A. There were two fellows, namely, Dela and Revera, came to my home and presented me with a petition.

Q. About what time was that? What month?

A. This was about August 10, 1953. Prior to the meeting we had with the company with regard to this Banez case. At which time these two brothers were requesting my approval of the petition circulation among the rank-and-filers, and I told them that they should go through the proper channels, through the board, discuss with the board what the intent of the petition. And I further asked them what was

(Testimony of Francisco LaTore.)

the petition for and they refused to tell me the intent of the petition.

Q. Can you tell the Examiner what the substance of the petition was?

A. The only intent that they enlighten me in regards to the petition was to call a general membership meeting to clear up some misunderstanding between the rank-and-file and the officers, more particularly the Japanese.

Q. Just by way of background, was that a general membership meeting of the Olaa unit?

A. That was the request, Mr. Counsel, but I understand the situation of the Olaa Sugar Company, various localities are spread out such that when we do call for a general membership meeting it involves the stopping of the whole operation and [180] also with the whole employees in that company.

Q. About how many employees or union members were there in 1953, at that time, in the company?

A. At that time there were about 840 union members.

Q. So a general membership meeting would involve about 840 individuals? A. That's right.

Q. What then proceeded, Mr. LaTore, after you had spoken to these two men and they told you about this petition?

A. I invited them to come to attend one of the security board meetings to present their case. So they came to one of the security board meetings.

Q. Executive board meeting?

(Testimony of Francisco LaTore.)

A. That's right. The board members and the officers called the attention——

Q. You were there?

A. Yes, sir. Called the attentions and—— [181]

* * * * *

Q. Will you continue with that? Briefly, what happened?

A. I will make it short this time. The policy of the union whenever a grievance arise, we do as much as possible to discuss and settle grievances before the security board, stewards, and all officers. However, when was asked the intent of their petition, these two particular men just refused what they would want in that petition. After this board meeting——

Q. Are you saying by that that these two men refused to define what they had on their minds, is that it?

A. That's right. After this, the following day, the security board meeting, the stewards of the particular camp where one [182] of the petitioners live came up again to my home, stating that Banez and with these two guys are going around circulating petitions.

* * * * *

Q. (By Mr. King): Approximately when was that?

A. That was after about August 10, 1953.

Q. After August 10th?

A. Yes. After the conversation that we had in my own home.

(Testimony of Francisco LaTore.)

Q. It was after this executive board meeting, is that right? A. That's right.

Q. (By Trial Examiner Doyle): How long before October 19th was it?

A. It was between—about ending part of August 1953.

* * * * *

Q. (By Mr. King): Can you state again, Mr. LaTore, what was it that the stewards from this camp reported to you? [183]

A. The steward at the camp reported to me that Banez and Simon Dela and Revera were going all around together in various camps circulating a petition.

Trial Examiner: What was this petition for?

Q. Can you explain that to the Examiner, what that petition was?

A. I didn't really know because they just refused to tell us what they have in mind with regards to the petition.

Q. What was the purpose of the petition, the same you have already stated, asking for a general membership meeting?

A. I suppose it would be the same as asking for general membership meeting.

Q. All right, what happened then?

A. So on behalf of the board I was appointed the head investigator to check up in regards to this move of the three fellows involved in the petitions. I started to check up from camp to camp, holding meetings from camp to camp, and compiled all the

(Testimony of Francisco LaTore.)

reports regards to this petition circulation, and most particularly how Banez happened to be in the picture. It looks like that ever since Banez had made up his mind to quit from the union that he seems to be a mind out of place any way in the camp in any department that he was working with. [184]

* * * * *

Q. (By Mr. King): Mr. LaTore, you have testified, I believe, that about the end of August 1953, thereafter you conducted an investigation of this matter you discussed? A. That is right. [185]

* * * * *

Q. (By Mr. King): Mr. LaTore, you testified that you conducted [186] this investigation with respect to Mr. Banez's conduct from the end of August up until what time, approximately?

A. Somewhere around half of October, 1953.

Q. Until about the middle of October?

A. That's right.

Q. What then did you do with the results of this investigation?

A. I call a special security board meeting to report what I have got, what I have done.

Q. Was that about the middle of October, 1953?

A. That's right.

Q. And can you tell the Examiner approximately how many people were at this executive board meeting?

* * * * *

A. At this time we call a special board meeting,

(Testimony of Francisco LaTore.)

increasing the number approximately around 70 members attended that meeting.

* * * * *

Q. (By Mr. King): That included stewards?

A. That's right.

Q. And so forth, as well as all the unit officers?

A. That's right.

Q. And observers, did you say? [187]

A. Yes. [188]

* * * * *

Q. (By Mr. King): Just very briefly, Mr. LaTore, can you tell the Examiner what the unit decided to do at this meeting?

A. Upon my reporting to the——

Q. No. Just what did the unit decide to do?

A. After the meeting?

Q. After the hearing or meeting.

A. After the meeting of the board, the stewards, we decided to take up this matter to the company's attention.

Q. Was that matter taken up with the company?

A. Yes, sir. [189]

* * * * *

Q. (By Trial Examiner): Mr. LaTore, there has been some testimony here that there was a meeting of union representatives and company representatives on October 19th. Does that refresh your recollection? Was that the time when you met with the company pursuant to the action of the executive board? A. I think so.

(Testimony of Francisco LaTore.)

Q. (By Mr. King): Where was that meeting held, Mr. LaTore?

A. At the office conference room.

Q. At the Olaa Sugar Company office conference room? A. That's right.

Q. Tell the Examiner who was present on behalf of the union, just briefly.

Trial Examiner: How many members were there and the principal spokesman for each side.

A. In behalf of the union we always represent 20 members of the union. [190]

Q. (By Mr. King): You were there personally?

A. Yes, sir.

Q. Did you present the matter to the company?

A. Yes, sir.

Q. And who was there for the company?

A. Mr. West, Mr. Isherwood, Mr. Burns.

Q. What did you say to the company at that time?

A. We told the company because of the hazard of Brother Banez to the community, more especially to the cane cutters, that we want to enforce the section of our contract which we believe Banez have been violated.

Q. That's section 1 of the contract?

A. That's right.

Q. Will you give in a little more detail just exactly what you said to the company in this regard?

A. We told also the company that we have deal and we have help a lot Banez—we told to the offi-

(Testimony of Francisco LaTore.)

cial of the company that we have given enough deal, helping a lot on behalf of Banez ever since he was employed at Olaa Sugar Company since 1946. [191]

* * * * *

Q. (By Mr. King): As I understand it, Mr. LaTore, you stated to management the background of the union's relations with Mr. Banez, is that correct? A. That's right.

Q. You said that since he had been there since 1946 he had been in trouble, is that it, and the union had assisted him in the past? A. That's right.

Q. Years ago? A. Yes.

Q. Then what did you say to management?

A. Then we told the company to investigate the matter and wait for the reply.

Q. What was this matter that you asked the company to investigate?

A. The hazard of Banez among our rank and file, as well as the community.

Q. Did you explain to the company what that, as you say, hazard was? A. Yes, sir. [192]

Q. What was that?

A. Well, he always get fight from friend in camp, in the department that he belongs to.

Q. Was anything said by him with respect to this matter that you had investigated yourself?

A. Yes, sir. [193]

* * * * *

Q. (By Mr. King): In other words, what did

(Testimony of Francisco LaTore.)

you say to the company with respect to the matter you had investigated?

A. Well, we told the company the whole history background of Brother Banez within the community since he started in the employ of Olaa Sugar Company, up to the present time before his dis-chargement.

Q. We understand that; you have covered that. But what I am directing your attention to is that investigation you say you made from the latter part of August through September. Did you call that to the company's attention? A. Yes.

Q. And what was that?

A. We told the company that Banez was a member and a guy responsible for the petitions circulated.

Q. Was anything else said about Mr. Banez, what he had been doing that the union considered made him a hazard?

A. He has been seeing too many stewards that the Japanese alone are looking for the nationality and the Filipinos have been deprived of opportunities with regard to promotions, [194] applying for jobs and so forth. So with those lines the whole harvesting department, the harvesters at that time wanted to strike in protest with all this hazard that Brother Banez had been doing. [195]

* * * * *

Q. (By Mr. King): Mr. LaTore, do you understand that? Was that statement you just made,

(Testimony of Francisco LaTore.)

or words to that effect, mentioned by you at that time? A. Yes, sir.

* * * * *

Q. (By Mr. King): You said that that was a hazard. By that you mean a chance there might be trouble on the plantation with respect to cane cutters? A. That's right. [196]

* * * * *

Q. (By Mr. King): Can you tell the Examiner, Mr. LaTore, whether that business of the change over and a technological layoff was mentioned at the conference? A. Yes, sir. [197]

* * * * *

Q. (By Mr. King): Mr. LaTore, did the union state this matter of the hazard in connection with what you have just testified to was one of the bases anyway for taking up the matter of Mr. Banez with the union? A. Yes, sir.

* * * * *

Q. (By Trial Examiner Doyle): Mr. LaTore, did the union ask the company to discharge Mr. Banez? In that conference?

A. We did not ask for it. [198]

Q. What did you say relative to discharging or getting rid of Mr. Banez?

A. We told the company that we stand in our status quo, section 1 of the agreement, which we believe Banez has violated. [199]

* * * * *

Q. (By Mr. King): Mr. LaTore, you say you

(Testimony of Francisco LaTore.)

are employed by Olaa Sugar Company; is that right? A. Yes, sir.

Q. Actually, at the present time you are a business agent? A. Yes, sir.

Q. On leave of absence from the company under the contract? A. Yes, sir.

Q. And that was effective from the first of this year? A. That's right.

Q. But in 1953 you were an employee of the company? A. That's right.

Q. And a unit official? A. Yes, sir. [200]

Cross Examination * * * * *

Q. (By Mr. Karasick): And you knew that Mr. Banez was a member of the union from sometime shortly after 1946 to around 1952, is that right?

A. That's right.

Q. And then from sometime in 1952 up to the present time, Mr. Banez has not been a member of the union, is that correct? A. Yes.

Q. Now, as I understand your testimony, it came to your attention through Mr. Dela, is it, and Mr. Revera? A. Yes.

Q. That there was a petition being circulated and the [201] substance of this petition was that the members were dissatisfied with some of the employment conditions on the part of the Filipinos and they wanted to call a meeting and clarify some of these misunderstandings, is that right?

A. That's right.

Q. And you and other officers of the union felt

(Testimony of Francisco LaTore.)

there were regular channels to take and this was not the proper procedure, to go around petitioning for this meeting, is that right?

A. That's right.

Q. And as a result of that, you heard that Banez had also been interested in it, perhaps had circulated a petition, is that correct? A. Yes.

Q. And you made an investigation and you found out that that was a fact, right?

A. Yes.

Q. As a result of that you then decided, with other officials of the union, that this was a matter which violated section 1 of the contract, and you brought the matter to the company's attention through your grievance procedure, is that it?

A. That's right. [202]

* * * * *

Q. And did you understand this to be true, Mr. LaTore, that you called this matter to the attention of the company and said that this you thought was a violation of section 1 of the contract as to Banez's activity with respect to this petition? Right? A. That's right.

Q. Now, you wanted the company to do something about this, didn't you? A. Yes. [203]

Q. It was of sufficient importance to call the attention of the company to it. Right?

A. Right.

Q. Now then, am I right that you asked the company to do something with respect to Banez

(Testimony of Francisco LaTore.)

if you were right in bringing this complaint to their attention? A. That's right.

Q. What did you ask them to do about that? Did you ask them to promote Banez? A. No.

Q. Give him a better job? A. No.

Q. What did you ask them to do?

A. We just told the company to act upon this grievance; either transfer him or kick him out of the company. It is not our business.

Q. Isn't it a fact, Mr. LaTore, and isn't there really no argument about this, that the union went into the company and said, "Look! We think that is violating this section of the contract; if you violate this section of the contract, you are subject to discharge. We think he is violating it; we ask he be discharged." Isn't that the fact?

A. I think what the section said "disciplinary or discharge."

Q. All right. Now, weren't you asking for his discharge, Mr. LaTore? There's no argument about that, is there? [204] A. Up to the company.

Q. Of course. You couldn't fire him yourself, but you were asking the company to do this, weren't you? Isn't that right? A. Yes.

Q. I am not quite sure, Mr. LaTore, I understood what it was that you told the company at this meeting on October 19th. You were the principal spokesman for the union, weren't you?

A. That's right.

Q. Was Mr. Arakaki with you that day?

A. Yes.

(Testimony of Francisco LaTore.)

Q. Any other official of the union?

A. Yes.

Q. Who?

A. Our grievance committee. Brother "Bull" Shirasaki.

Q. Now, Mr. Shirasaki was a member of the grievance committee, right? A. That's right.

Q. Anyone else who represented the grievance committee or was on it? A. Ramos. [205]

* * * * *

Q. And other members of the grievance committee were present, is that right?

A. That is right.

Q. No other officers besides the grievance committee members, you, and Mr. Arakaki, is that right? A. That is right.

Q. You were the principal spokesman for the union, you did most of the talking from the union point of view, right? A. Right.

Q. Will you tell us now, as well as you can remember, what it is you told the company, or even better than that, tell us the whole conversation as you recall it, telling us who said what from the time you got in until the time you left. I know you don't remember the exact words, but tell us as well as you remember what was said and who said it?

A. I told the company "Since this separation of petition came along and Brother Banez was—broke into the picture, that from there on I was appointed to follow up the matter in—to agreeing to the vari-

(Testimony of Francisco LaTore.)

ous camps, taking investigation and compiling all the reports that I have we have found that [206] Banez had always try and always giving us lots of troubles within the community, more especially the rank-and-filers, outside of working hours, during working hours, he has been making all troubles, and we pointed out to the company that at this time we feel that Banez have violated section 1 of our agreement, therefore we ask the company to act upon this grievance."

Q. Do you remember anything else that you said or they said on that occasion, at any time during that meeting?

A. They told us that they will take the grievance into consideration and give us the reply afterward.

Q. Who was it from the company who told you that?

A. To the best of my recollection, I think that was Mr. Burns.

* * * * *

Q. You say that you told the company that your investigation had shown that Banez was causing trouble, is that right? A. That's right.

Q. No supervisor of the company had told you that, had he? A. No. [207]

Q. I think you said that he was causing trouble on the job, as well as off the job?

A. That's right.

Q. Is that right? What sort of trouble was he causing, Mr. LaTore?

A. Oh, he had several fights in the mill, where

(Testimony of Francisco LaTore.)

he was working one time in the mill, and then outside when he was transferred as cane truck driver, he talk with the co-workers in the troubles in the dispensary where he was employed for around three months.

Q. What sort of trouble did he make in the dispensary?

A. He had annoyed the girls co-workers in the dispensary, so they put him out of the dispensary position. [208]

* * * * *

Cross Examination

Q. (By Mr. Collins): Mr. LaTore, at this meeting did you ever in so many words ask the company to discharge Mr. Banez?

A. We tell the company that Banez has violated section 1 of our agreement and we think action should be taken by the company.

Q. I repeat my question: Did you ask the company to discharge him? A. No.

Q. Did you ask the company to discipline him, other than what you have stated about your position on the violation of the contract?

A. We did not ask the company to take action one way or the other, but just we said we want to enforce the status quo of section 1 of our agreement.

Q. In other words, you said to the company, "Here's the problem; [210] we are dropping it in your lap," is that it?

A. That is right, sir.

(Testimony of Francisco LaTore.)

Mr. Collins: Nothing further.

Cross Examination (resumed) [211]

* * * * *

Q. (By Mr. Karasick): All right. Now, what I am trying to find out, Mr. LaTore, is this, whether or not this is correct: When you and the committee went in to see the company about Banez, you had an idea or a purpose for going in, didn't you?

A. Yes.

Q. The purpose was to have the company do something about Banez, isn't that right? Isn't that right?

A. That's right.

Q. You couldn't do anything about Banez's employment, could you?

A. No.

Q. You couldn't either hire him or fire him or promote him or demote him, could you? [212]

A. No.

Q. You had to rely on the company to do that, didn't you?

A. That's right.

Q. And you felt if you pointed out this section of the contract, that that covered the matter, and if the company followed that contract they would do something with respect to the employment of Banez, isn't that right?

A. That's right.

Q. All right. Now, what they would have to do with respect to Banez was something about his employment, either discipline him or discharge him, according to the terms of that contract, is that right?

A. That's right.

* * * * *

(Testimony of Francisco LaTore.)

Q. (By Mr. Karasick): By the way, did you also have that in mind as your purpose when you went in? That's right, isn't it?

A. That's right. [213]

* * * * *

Redirect Examination

Q. (By Mr. King): Just to clarify this, Mr. LaTore, when you went in with your grievance committee to meet the company, as Mr. Karasick has pointed out, that was under section 1, paragraph 8, of the agreement, right? A. Yes.

Q. And you testified that your committee's intention was to do something about the situation under the section in question, right? A. Right.

Q. Isn't it a fact that you knew that it was optional with the company whether they would find the grievance that you presented to the company substantiated or not, it was optional with the company whether they took action? Isn't that correct?

A. That's correct. [214]

* * * * *

Mr. King: I offer to prove through Gabriel Amaral, who is a truck driver and was in 1953 at the company, that about the middle of 1953, on the job, Mr. Banez said to the witness, "The Japs get all the breaks on this plantation; the Filipinos no get nothing." And that Amaral replied to that, "That's because most of the Japanese know the job; that's the reason they get a better job when they apply for it." And that thereupon, Mr. Banez turned away and walked off.

And that's the extent of the offer of proof with respect to the witness Amaral.

Mr. Karasick: To which offer of proof objection is made.

Trial Examiner: Objection sustained. I take it the [219] same grounds as stated in the prior objection relative to similar matter.

Mr. Karasick: Correct.

Trial Examiner: And I make the same ruling. All right, Mr. King.

Mr. King: I have a further witness and would offer to prove through him—incidentally, his name is Guzman Lopez, also a truck driver for the company and was in the year 1953. Mr. Lopez would testify that in about the month of July, 1953, while on the job, Mr. Banez said to him, "Filipinos no more chance on this plantation; every time one job opening Filipinos never get; Japanese get first break." And the witness Lopez would further testify that substantially the same statements were made to him by Mr. Banez thereafter on five or six different occasions between the period July 1953 up to December 1953. And that's the extent of the offer of proof with respect to that one.

Trial Examiner: All right. I will make the same disposition of that, on the same objection. Sustained.

Mr. King: The final witness I would call and offer to prove through him certain matters would be Domingo Baguio, also a truck driver, employed by the company as such in 1953. He would testify that in early 1953 while on the job Mr. Banez said

to him, "When there is a job posting on the bulletin board, Filipinos apply for the job they don't get the job; [220] when Japanese apply they get the job." And the witness would further state that conversations substantially the same as this took place between him and Mr. Banez on two or three occasions from that time, in early 1953, up to and including the middle of 1953, to the best of his recollection.

And that is the extent of that particular offer of proof, and that is all I have, Mr. Examiner.

Trial Examiner: The same objection being made, I will make the same ruling with respect to such offer of proof.

* * * * *

MYRON O. ISHERWOOD

a witness called by and on behalf of the respondent employer, Olaa Sugar Company, Ltd., being first duly sworn, was examined and testified as follows:

Direct Examination [221]

* * * * *

Q. (By Mr. Collins): What is your occupation, Mr. Isherwood?

A. Director of industrial relations with the Olaa Sugar Company.

Q. How long have you occupied that position?

A. Since January 1, 1944.

* * * * *

Q. You have heard testimony concerning a meeting between the union and the company on October 19, 1953. Were you present at that meeting?

(Testimony of Myron O. Isherwood.)

A. Yes.

Q. Would you testify to the best of your recollection as to what was said by the union and by the company at that meeting, explaining who was present principally on behalf of the union and who on behalf of the company?

A. The meeting was held approximately 3 o'clock on the afternoon of October 19, 1953. Present for the company were the manager, Mr. Burns, administrative assistant at that time, Mr. West, and myself. There were about twenty people present for the union, among them being Kinji Omuri, Toshio Shirasaki, Frank LaTore is second vice-chairman of the unit, Fred Low, who is business agent for the union but not an employee of ours, Matsui Inaga.

Q. Did any of the other union members participate in the discussion? [222] A. Yes.

Q. Would you name those who may have participated in the discussion?

A. I am sorry I cannot recall the names of the ones who participated. There were four or five spoke up to make statements relative to the matter that the union was bringing before us. I couldn't say now who it was. I was trying to recall those others who were there.

Q. Yes. Would you continue with your testimony concerning what occurred at that meeting?

* * * * *

A. As I recall, Mr. Burns asked who would be the spokesman for the union and Frank LaTore

(Testimony of Myron O. Isherwood.)

indicated that he would. He [223] made statements to the effect that a petition had been circulated, a copy of which he did not have with him, which we asked him for at the time, but he gave us the general idea of what it contained, and called on two or three of the union members present to substantiate the fact that the petition had been taken to them for signature. "

* * * * *

Trial Examiner: To the best of your recollection, Mr. Isherwood, you will have to tell what was said and done there.

* * * * *

A. A statement was made that a petition was circulated; no statement was made as to what the petition contained, nor was there a copy of the petition there. As the meeting progressed various members of the union were called upon to make statements as to incidents that had occurred during the course of time that Favorito Banez had been an employee, with specific reference to the place and what had happened at those instances. [224] At the conclusion of those statements——

Q. Could you tell us who made those statements?

A. As I recall, one was either by Kinji Omuri or Bueno, one of our electricians, or some one, who was one of our electricians—we have a dozen of them—that while in the carpenter shop acting as a helper to one of our electricians who was changing or repairing an electric motor or a belt that was driven by an electric motor, Banez removed

(Testimony of Myron O. Isherwood.)

the "Do not touch" sign which is hung on our switches and activated the electrical circuit, which could have been very dangerous to the employee working on the motor. That was one instance. I had no knowledge of that incident prior to it being brought up at that time as no report had been made on it, although we were told that a meeting was held by the union during lunch hour to explain the situation to the other employees of the factory, and it was also reported to one of our supervisors.

Q. With respect to the statements that you have made, the reports that you have referred to, were they made at this particular meeting?

A. Reference was made to that report at that meeting, yes.

Q. Can I ask you to confine yourself as precisely as possible to what was said and done at this particular meeting. Now you were relating various incidents that occurred in connection with Mr. Banez. Continue.

A. Reference was also made to the fight which Banez had with [225] another employee named Cabrereros in 1950 at the factory. A report was made that Banez had passed or made remarks relative to the officers of the union not backing up the Filipinos employees of the company on job selection at the service station of the company.

Mr. Karasick: May I ask, Mr. Examiner, if the witness will indicate whether these statements were made at this meeting, and further, if they were,

(Testimony of Myron O. Isherwood.)

that the persons who allegedly made the statements be identified.

A. The statements were made at the meeting. I do not recall what persons made the statements as they were employees, there were several employees who got up and talked. There were several employees who talked at the meeting. Some of them through the use of an interpreter, to further explain what the person was saying. We have somewhat of a language handicap among our employees with respect to the English language and occasionally one person will make a remark which will be interpreted by another person voluntarily.

Reference was made to the union agreement, as to the specific wording of the contract, to identify whether or not the instances that were brought forth by the union occurred on the job, as anything which occurred off the job would not have been covered by the agreement. That is, any activity that he might have engaged in during non-working hours, away from company premises. [226]

The question also came up as to whether Banez was a member of the union at that time, and the statement was made——

Q. (By Mr. Collins): When you say a question came up; do you mean someone from management——

A. Someone from management questioned the union as to whether or not Banez was a member of the union.

(Testimony of Myron O. Isherwood.)

Q. Do you recall who asked the question; did you ask it?

A. It would be one of three people. Mr. Burns, Mr. West or myself.

Q. Your memory doesn't respond now to the——

A. I don't recall now which one of the three asked it, except that the question was asked. And the answer was given by Mr. Arakaki that Banez was not a member of the union.

There then developed some discussion of our working relationships with the union, particularly in the light of the change over from mechanical harvesting, which was in the process of being done, with respect to employee termination. That our relations with the union had been satisfactory and that we hoped that they would continue that way as we had reached agreement in principle on the methods to be used during the employee terminations.

Mr. Burns stated at the end of the meeting that any action by any person which would tend to stir up racial antagonism or ill feeling was a very serious problem, and that the company could not countenance such activity by any employee [227] along that line.

The meeting adjourned probably around 4:30 or so, I would say.

Q. How long was the meeting in session?

A. About an hour and a half.

Q. How did this meeting happen to occur? Did someone call it; was it a regular scheduled meeting?

(Testimony of Myron O. Isherwood.)

A. It was not a scheduled meeting. I was informed that morning by Mr. West that the union had asked for a meeting that afternoon and that I was told to be present.

Q. Do you recall at that meeting whether the union or any spokesman for the union made any suggestion, request or demand, that the company discipline Banez in any way in connection with the matters brought up at the meeting?

A. The copy of the contract was brought out and section 1 was referred to, and request was made by the union for some action by the company.

Q. Was the action that the union was requesting specified? A. No.

Q. Is there anything further that was said at this meeting that you can recall, said or done?

A. Nothing.

Q. After this meeting did you have any discussions with Mr. West or with Mr. Burns concerning the matters that had been raised in the meeting?

A. Yes.

Q. Did you have many discussions or just a few?

A. Several discussions.

Q. Approximately when were those discussions had?

A. I would say not less than twice a week and more often than that, whenever anything came up with respect to the case itself.

Q. As a result of this meeting with the union and these subsequent discussions that you have just referred to, was any investigation made into the

(Testimony of Myron O. Isherwood.)

work record of Mr. Banez? A. There was.

Q. Who made such an investigation?

A. I did.

Q. And what was the result of your investigation?

A. I made a recap of the entire time that Favorito Banez had been an employee, starting from the day of hire, February 4, 1946, his work on the various jobs to which he had been assigned since his hire, as a cane cutter, a car tender, centrifugal operator, hospital attendant, and then a cane cutter, then a temporary transfer as fingerlift operator, then as a full-time fingerlift operator, then as a scaleman, then back to a cane cutter, and then as an electrician trainee. There may have been some slight deviation, one little job may have come in ahead of the other. Then as transportation handyman and finally as a senior cane truck driver. [229]

Q. In investigating his work record did you look into the matter of disciplinary action that may have been taken in connection with his work?

A. Yes. [230]

* * * * *

Trial Examiner: I am going to grant your motion and permit the amendment, Mr. Collins. [236]

* * * * *

Mr. Collins: In accordance with the Examiner's ruling, the company moves to amend its answer by modifying the section marked with the Roman numeral XI to insert at the conclusion of that page

(Testimony of Myron O. Isherwood.)

and in lieu of the balance of the answer found [237] on page 3 the following:

And that based upon such conduct, considered in the light of the work record of the complainant and the effect of such conduct upon the operations of respondent, the complainant was discharged by the employer.

We have attempted to limit the extension here to the work record and to the effect of the general charge of the disruption of harmonious relations upon the company, all of which I think is included within the original answer, but specifically merely extending it to permit the admission of the work record. [238]

* * * * *

Trial Examiner: I am going to permit the respondent to amend the answer as the respondent wishes, in which ever way he thinks will serve the respondent's purpose, in order that he may present a full case as he sees it. [240]

* * * * *

Mr. Karasick: May I examine the witness on voir dire?

Trial Examiner: Yes.

By Mr. Karasick:

Q. Mr. Isherwood, I hand you certain photostat documents which are marked "Employer's Exhibit 7-A to 7-G, inclusive, for identification, and ask you if those are documents which you have taken from the personnel file of Mr. Banez, the complainant in this case? A. They are.

(Testimony of Myron O. Isherwood.)

Q. When with reference to October 19, 1953, did you first look at any of these documents?

A. Many of them I looked at before October 19th. The date on them; they came in before the 19th of October.

Q. No. But with reference to October 19, 1953, when was the first date thereafter that you looked at those documents, and you personally, I mean?

A. Probably some time between then and the first of December. I couldn't be specific as to the date, no. [253]

Q. Do I take it that it is your testimony you did look at these documents prior to the discharge of Banez? A. Yes. [254]

* * * * *

CALEB E. S. BURNS

a witness called by and on behalf of respondent employer, having been previously duly sworn, resumed the stand, was examined and further testified as follows:

Direct Examination

Q. (By Mr. Collins): You are the same Mr. Burns that has previously testified? A. I am.

Q. And you are the manager of the plantation, is that correct? A. Yes.

Q. Do you recall the meeting of October 19, 1953, with the union? A. I do.

Q. You have heard Mr. Isherwood's testimony with respect to it. Do you have anything that you wish to add to that? [257]

* * * * *

(Testimony of Caleb E. S. Burns.)

A. No. I think in general Mr. Isherwood's statement covered the general area of the meeting. The one factor however I do not recall whether Mr. Isherwood discussed in any detail or not was the problem of the serious racial angle that was mentioned by LaTore, I think, at that meeting. That would be the only addition that I would make to Mr. Isherwood's statement.

Q. And what was the substance of the statement made by Mr. LaTore at that time, as you recall?

A. He stressed the fact that due to the layoffs which were planned that there had been a certain amount of racial antagonism and that in general Mr. Banez had been one of the parties responsible for the creation of this situation.

Q. Do you recall whether the union made any request or demand upon you at this meeting that Mr. Banez be disciplined or discharged? [258]

* * * * *

A. October 19th was the date, due to my checking records. I know that. The meeting was in the afternoon. Approximately twenty union members were present. The names have been [259] given to you in more detail than I am able to give them. The spokesman was LaTore. Frankly, LaTore is difficult to understand, due to his lack of knowledge of the English language. Those of us who deal with people who do not speak English too well get an idea; sometimes we don't know what all these words mean. LaTore's presentation was primarily

(Testimony of Caleb E. S. Burns.)

based on the fact that there had been a petition circulated. We asked what was in the petition. We did not get a very clear answer to what was in the petition.

Then there were a number of the men there stood up and gave examples of difficulties that Banez had in working with his fellow workers. Some of those examples were given here today. I think there were a few more. I don't recall them but they were frictions between Banez and some of his workers.

But to my own feeling of the thing, the primary problem there was based on this racial problem, which was created primarily by the layoffs which we were faced with. The reason why I say that is racial, there were approximately 75 percent of our work force in the field Filipinos, and due to the fact that the layoffs were in the field primarily, there were more Filipinos affected than anyone else, and consequently there was some heat generated there. We were aware of that. This was not new information to us at that meeting, but it was a reiteration on their part of the situation which we were aware of. Perhaps that is why that made more of an impression on me. [260] I don't know. But nonetheless, that was the significance of this meeting as far as we were concerned. We told the union, and I answered them, that we would check their various charges, but frankly we were very much against any racial antagonism. It was not the policy of the company to engage in anything like that whatsoever, in terms of layoffs, promo-

(Testimony of Caleb E. S. Burns.)

tions, or any other employee relationships. And we said again that we would study the matter and we would let them know. There was no effort on their part to indicate what they thought we should do with Banez. They said this, after their presentation of these facts that I have mentioned, or incidents, they said that they were bringing up the fact that Banez had violated section 1, paragraph 8, of the contract, and wanted us to take some action on it. But their primary pitch was violation of the contract. There was no indication of trying to tell us what to do about it.

Q. Of course you understood the contract called for disciplinary action or discharge?

A. That is correct. After continuous repetitious activities of this nature.

Q. Was Banez the only one mentioned by the union as being the creator of this racial unrest?

A. No. They mentioned two other individuals, but they said that they would talk to those individuals and they felt that would be taken care of. Now, the information we had received [261] prior to this, we did not have the information that there were two other people mixed up in it. It was primarily Banez that was the person concerned with this activity.

Q. Did you know, too, that Banez was not a union member; you knew that?

A. I did not know that until October 19th.

Q. Did that come up in the course of the meeting, that he wasn't a union member?

(Testimony of Caleb E. S. Burns.)

A. Yes, it did, because it was pointed out under that paragraph that he was not a union member.

Q. Did you know whether the other two men mentioned were union members or not?

A. We were told at that meeting that they were union members.

Trial Examiner: All right, Mr. Collins, will you continue?

Q. (By Mr. Collins): You mentioned the general mechanization and layoff program. Will you explain to the Trial Examiner what that is all about?

A. We employed as of December 1953 approximately 1100 bargaining unit people. We have a mechanization program which calls for the ultimate elimination of some 540 people, which is a very substantial layoff in terms of the size of our operation and also without question the largest lay-off the sugar industry has ever experienced in recent years. So it is something of very unusual importance. The layoffs and the [262] problems associated with the layoffs were discussed with our union, agreement was reached on severance pay and the method that would be employed in laying off these people. The first group to be laid off was 219 employees as of December 17th, the final upshot of the thing. Actually, discussion started in early summer, and we had a deadline for the layoff sometime prior to December 15th but due to the fact our mechanical equipment did not arrive on time, it was delayed until that time.

(Testimony of Caleb E. S. Burns.)

That was one section of the layoffs. Now, we had a great deal more to go. And we were in the throes of going through this layoff program when this problem that we speak of, this racial problem, became rather serious.

The mechanization program has one more layoff to go. We have had two, one December 15th and one July 17th and we will have another when our equipment arrives sometime next year. Now we make a great deal of this whole mechanization program because if we are not able to fully mechanize that plantation it will cease to operate in years to come because of our very low productivity per employee. Not because our people don't work but because we do not have or did not have the equipment to help them produce. And this whole program has to go through in order to make it an economic operation. And actually, as I have said, it will be the saving of our company.

Q. After this meeting with the union, did you have any discussion [263] with any of the members of the management of your company concerning Banez? A. Yes.

Q. Did you have many meetings or few?

A. We had many discussions about this problem. I will say this: we have a meeting every morning at 8 o'clock of our top group, the assistant manager, the field superintendent, and the factory superintendent. It is an operational meeting that usually lasts anywhere from 15 minutes to a half hour.

(Testimony of Caleb E. S. Burns.)

This Banez situation was not only discussed at the morning meetings after October 19th but was something that we had been discussing some time prior to that too.

Q. At any of these meetings was Banez's work record considered, Mr. Burns?

A. It was. As a matter of fact, a request was made for Banez's work record.

Q. Who made that request?

A. I made that request, and I think Mr. West asked Mr. Isherwood to dig it out.

Q. Did you review his record? A. Yes.

Q. Mr. Banez was discharged? A. Yes.

Q. Are you the man that discharged him?

A. Yes. [264]

Q. What was your decision based upon?

A. My decision to discharge Banez was based upon the racial problem that we were certain he had helped to create. We also were looking forward to the other layoffs that we had and the difficulties we felt we would run into in the future if action was not taken. We looked at his work record, which was very poor, and in addition, we were in the position where we did not have to adhere to a policy which we had requiring the hiring of a cane cutter before we would allow any of our department heads to get rid of any other employee.

* * * * *

Q. (By Mr. Collins): Mr. Burns, I show you General Counsel's Exhibit 15, which is a letter dated

(Testimony of Caleb E. S. Burns.)

December 1953, to Mr. Banez, and ask you if that is your signature attached? A. It is.

Q. Did you prepare that letter?

A. No, I didn't.

Q. But you signed the letter? A. I did.

* * * * *

Q. (By Trial Examiner Doyle): Just one question. Of all the reasons that you gave for Mr. Banez's discharge, you did not say that one factor was that the union had pointed out to you that his conduct was in their estimation consideration of section 1 of the contract; did the fact that the union had pointed that out, did that play any part in your decision to fire Banez?

A. It did to a certain extent; it was a factor to be considered.

Q. Yes. You didn't mention it before and I wondered, since we have spent so much time on that subject, whether you felt that was entirely unrelated to Banez's discharge? A. No. [266]

Trial Examiner: All right, Mr. Karasick.

Cross Examination

Q. (By Mr. Karasick): Isn't this correct, Mr. Burns, that as Mr. Collins has previously stated, the primary reason for the discharge of Banez, together with the other reason assigned by the company, has been the feeling of the company of the alleged violation of section 1 of the contract, as stated in your letter?

(Testimony of Caleb E. S. Burns.)

A. It is certainly one of the factors, without question.

Q. As I get the picture, it is something like this: For some time before October 1953 the company was contemplating a mechanization program, is that correct? A. That is correct.

Q. As a result of that program there would be involved the layoff of a considerable number of employees? A. That's correct.

Q. Because these employees, at least in the field, as you have indicated, were primarily of one racial group, your experience had indicated that there might be some feelings of discrimination and racial antagonism because of these mass layoffs or aggravated by these mass layoffs? Right?

A. I wouldn't say my experience because I hadn't gone through any such layoffs before.

Q. Did anything indicate to you that that would be the case?

A. We picked up the information that would certainly indicate [267] that that was a growing problem with us at that time.

Q. Laying off large masses of employees like that meant that you needed the cooperation of the union, did it not? A. That is correct.

Q. And this was a trouble period both for you and the union, and you wanted no union problems any more than you could possibly avoid them, particularly at that period, is that right?

A. We didn't expect any union problems.

(Testimony of Caleb E. S. Burns.)

Q. You did need the union's cooperation, though? A. Yes.

Q. Did I understand you to say, Mr. Burns, that you had discussed the problem of Banez with other company officials prior to October 19, 1953?

A. That is correct.

Q. In what respect did you discuss Banez with other company officials at prior dates?

A. We had, as I said before, indications that this racial problem was becoming serious, and at our meetings in the mornings very often we would discuss problems associated with the layoffs and also the problem of this growing resentment that we had fairly good information on.

Q. You didn't talk about Banez as such but about the problem of racial dissension?

A. No, we talked about both, Banez and the problem.

Q. Oh. [268]

A. His name had appeared.

Q. When is the first time that anybody brought you Banez's name with respect to racial dissension?

A. I wouldn't know exactly but I would say in July, approximately; the summer period.

Q. And who brought that information to you?

A. I don't know who did at first. It came in associated with the layoff problems.

Q. What was the first information you received in that connection? A. You mean——

Q. Specific information you received with re-

(Testimony of Caleb E. S. Burns.)

spect to Banez in July 1953, from the unnamed person?

A. The information that I received was that there was a growing problem as far as this racial situation was concerned, and that it was believed at that time that Banez was one of the people mixed up in it.

Q. Banez was mixed up in what specifically. You talked about a general racial problem.

A. Yes.

Q. What was it specifically that Banez was thought to be mixed up in?

A. Well, advising the Filipino group that they would not be treated fairly under the terms of the layoff agreement.

Q. Had you announced the layoff agreement at that time? [269]

A. We had not announced a layoff agreement in July specifically but everyone at Olaa was aware that layoffs were coming, and I think by July most people were fairly aware about how many.

Q. You still can't remember who first mentioned Banez's name? A. No, I can't.

Q. So, according to your testimony, from July you knew that Banez had this feeling?

A. I would say this, that from July, information or rumor or whatever it was, we started to get indications that this problem was growing and also that Banez was linked to it.

Q. Anyone else's name mentioned in that connection?

(Testimony of Caleb E. S. Burns.)

A. There was at the early stages one of our supervisor's name linked with it. And in checking the matter through we found that a supervisor had gone on some radio program and had actually stimulated this problem somewhat, but his pitch was primarily this, that the Filipino, especially the younger ones, should make every effort to go to school and learn a trade, and so forth, because of the problems associated with the elimination of hand labor.

Q. Who was the supervisor?

A. A man by the name of Mr. Patao.

Q. Spell it, please. A. P-a-t-a-o. [270]

Q. His first name, if you have it?

A. Antonio.

Q. Thank you. Did you call Mr. Patao in?

A. No, I did not. But I had someone in our organization talk to him.

Q. You did not talk to Mr. Banez?

A. I did not.

Q. No one from the company did, as a matter of fact? A. No.

Q. At any time prior to his discharge on December 17, 1953? A. No, I don't think——

Q. Pardon me?

A. I don't think anyone from the company did.

Q. So the matter of these allegations directed against Banez, he was *never* an opportunity personally to answer or to refute or substantiate, is that correct? A. Before discharge?

Q. That is right. A. That is correct.

(Testimony of Caleb E. S. Burns.)

Q. Dela's and Revera's names were mentioned to you on October 19th? A. That is correct.

Q. Had they been mentioned to you before that, Mr. Burns?

A. They may have; I am not sure.

Q. Did you speak to Dela or Revera about the matter, or did [271] anyone from the company?

A. Not that I am aware of.

Q. Dela and Revera are still employed by the company, are they not?

A. I believe they are.

Q. You indicated they were union members?

A. Yes.

Q. And pursuant to that section of the contract, it was not something which could be handled in the same way as with a non-union man, is that right?

A. I presume that's correct.

Q. The petition that you heard about,—I hand you, Mr. Burns, at this time General Counsel's Exhibit 18 for identification, which the reporter has just marked for me, and ask you if it is not so that that is the petition which was referred to by the union committee or LaTore or any of the union officers during the meeting of October 19th?

A. I don't know. I don't know. I have never seen the petition before.

Q. So that you never saw this petition before, is that right? A. No. That is right. * * * * *

Q. (By Mr. Karasick): Did you know, Mr. Burns, that the petition which the union people were telling you about on October 19th was a peti-

(Testimony of Caleb E. S. Burns.)

tion by members of the union who wanted to hold a special meeting on a Saturday in September 1953?

A. I did not know what the content of the petition was; we never saw a copy of it.

Q. They never did show you one? [273]

A. No. I never saw a copy of it.

Q. They told you something about a petition, as I understand it? A. That is correct.

Q. And as I understand it, you asked them, "What about this petition; what is it or was it?" Is that right? A. That is right.

Q. Who was it you asked, do you remember; was it LaTore?

A. I presume it was LaTore. You have to picture this, twenty people sitting around a table and very often more than one talking at once.

Q. Yes. I appreciate that. Do you recall, and I am not asking you now if you recall who said it, but do you recall if any one person at that time told you something about the petition at all?

A. I think that about the essence of it was that a petition was being circulated and when we asked could we see a copy of the petition, nobody had a copy. It had something to do, we understood, with a meeting, but that was about the limit of our knowledge.

Q. As I take it, the union's representatives were saying to you in effect that they were objecting or protesting this business of the petition, that Banez, they thought, had something to do with it, is that right?

(Testimony of Caleb E. S. Burns.)

A. Yes. I think that is a part of it. [274]

Q. Am I correct that the company did not ask the union to get a copy of this petition for them so the company could see what it was the union was protesting about? Is that right?

A. No. I think we did ask to get a copy of it, and we were not able to do so.

Q. But never at any time prior to Banez's discharge did they ever give you a copy of the petition so you could for yourself see what the petition was about? A. No.

Q. Did I understand you correctly, Mr. Burns, to say that you were certain that Banez had helped to create racial antagonism prior to his discharge?

A. Yes, I said, I think, that we certainly felt very strongly that he was instrumental in that.

Q. These are things you heard from other persons? A. That is correct.

Q. (By Trial Examiner Doyle): Is this prior to October 19, prior to this meeting?

A. That is correct. We did hear that this thing was going on.

Q. I am not talking about "this thing," Mr. Burns, about there being some feeling over these layoffs or the general situation there. Did you prior to October 19th hear specifically that Banez was fostering racial difficulties among your work force?

A. Yes. [275]

Q. (By Mr. Karasick): When and from whom, Mr. Burns?

(Testimony of Caleb E. S. Burns.)

A. I say I have no recollection of the time that that first appeared on our discussion sheet at all.

Q. Anything in Mr. Banez's employment record which would note the time and the informant who gave you this information? A. No.

Q. Anything which would indicate anywhere the details as to what Mr. Banez was supposed to have been doing?

A. No, I don't think there is.

Q. I take it there is nothing more specific that you can give us in that connection other than you have already testified, is that correct?

A. That is correct.

Q. (By Trial Examiner Doyle): Did you take any steps yourself, Mr. Burns, to institute an investigation after you heard this about Banez to find out if it was in fact true that he was fostering this situation? A. When?

Q. Prior to October 19th.

A. Yes, we did. At our morning meetings that I outlined to you, we kept sounding out with these department heads, as it were, what did the thing look like. In other words, it was most critical to us and we wanted to make sure that we were keeping abreast of it.

Q. I am again separating Banez from the general situation. [276] After you first learned that Banez had something to do with or was fostering this situation, what did you do to check up as to Banez's activities in that regard? Do you follow me?

(Testimony of Caleb E. S. Burns.)

A. Yes. We asked our department head people there to keep an ear out for any association between Banez and this other thing.

Q. All right. But I take it you heard nothing that disturbed you thereafter until October 19th, is that right?

A. No. We were disturbed and actually about September, I think, August or September, we set a deadline of October 15th when the layoffs would be effective. There was a pick up in this pressure, this racial problem. Then about October first we found that our mechanization could not be put into effect on the 15th of October but would be somewhat later, I don't know whether we went to November 15th or some other date. When we did that there was a slight easing of this problem. At least, it didn't get any worse.

Q. What I am getting at, again: while your problem might come and go with mechanization, what were you doing to determine what Banez was doing?

A. I was working through our department heads, who have their ear to the ground and working on it.

Q. What I am getting at: You didn't take any action in the matter until December 17th, when you did discharge him, and that is a long time after October 19th. So I take it that [277] though you say your department heads had their ears to the ground, you found nothing wrong with Banez until sometime at least after October 19th, is that right? You took

(Testimony of Caleb E. S. Burns.)

no corrective steps with regard to Banez until after the union came into the picture, did you?

A. That is correct.

Q. And if you thought that Banez had been doing something to seriously disrupt your organization you would have taken such steps?

A. Our thinking at that time was that we were in a position where we had to weigh very carefully what we did, and it was our best judgment at that time not to take any steps of that nature.

Q. Mr. Burns, the thing that appears to me and that is causing me to ask you these questions is this, and I understand you had an aggravating situation there due to the mechanization, even without animating the employee situation it was of such a nature it could have created differences between races in and of itself, isn't that correct?

A. That is correct.

Q. And there were times when, without all this confusion by Banez or anybody else, conditions would become acute when the layoffs would come and become less acute when layoffs were diminished. I understand that. What I am trying to get at is: In that interim when things were going along in general, [278] were you or your officers or assistants doing anything which would bring information to you that this excitement over this was being fostered or caused by Banez; were you doing anything to investigate that?

A. We were doing this. We were getting our information in. We didn't put on a full dress investi-

(Testimony of Caleb E. S. Burns.)

gation, but we were certainly keeping up with what was going on.

Trial Examiner: All right.

Q. (By Mr. Karasick): As I understand it, Mr. Burns, you first heard of Banez in this connection in July, 1953? A. Yes.

Q. And this, as you have explained, was a critical matter to you and to the company?

A. That is correct.

Q. You did not, either yourself or through other officials or supervisors of the company, warn Banez about this matter at any time from the time you first heard about it in July until he was discharged in December, 1953? A. That is correct.

Q. Is that right?

A. That is correct. I was studying it.

Q. I realize dates are hard to remember, but can you remember the date or the approximate date that you made a request for Banez's work record?

A. No, I can't. I know it was sometime probably after this [279] meeting.

Q. That was what I was going to ask you. Using the meeting as a starting or guide post, it was sometime after the October 19th meeting? A. Yes.

Q. Do you recall about how long, without setting the date? A. No, I don't.

Q. Was it a week or ten days?

A. I presume it would be within a week or ten days.

Q. Within a week or ten days. A. Yes.

(Testimony of Caleb E. S. Burns.)

Q. And it might have been within a day or two after, is that right?

A. It could have been. [280]

* * * * *

Cross Examination—(Resumed)

Q. (By Mr. Karasick): Mr. Burns, when did you make the decision to discharge Banez?

A. I presume about the 1st of November.

Q. Now you say you presume that.

A. Yes; I am not certain of the exact date.

Q. The decision was one that you made yourself, right?

A. I made the decision but it was made on the basis of consultation with our top staff.

Q. Consultation with top staff means who?

A. Mr. West and Mr. Conant and Mr. Lieth, I believe, at that time.

Q. Mr. West, and who else?

A. Mr. Conant.

Q. Mr. Conant is——

A. Field superintendent. [288]

Q. First name? A. Raymond.

Q. And you mentioned another one.

A. Lieth. L-i-e-t-h. William Lieth.

Q. And his position?

A. Factory superintendent.

Q. Whom else did you consult, if anyone?

A. I think that during the course of discussions on this case from the October 19th meeting, let us say, forward, involved all of our department heads. You have the list here somewhere, I think; on our

(Testimony of Caleb E. S. Burns.)

table of organization. I will outline to you how that is done.

Every Friday morning we have a meeting of department heads, where our top group and our department heads meet. This subject was discussed on occasions before the October 19th meeting and afterwards.

Q. Pardon me. "This subject." What subject?

A. The subject of Banez and the subject of the racial problem.

Q. You say it was discussed before October 19th, is that right? A. That is correct.

Q. And I think you indicated how long before yesterday. What was the date of that?

A. I think sometime in July the problem—I will differentiate [289] the problem now. Banez and the racial problem. The racial problem came first, I think, actually. That is, we became aware of that and very shortly thereafter Banez's name became associated with it.

Q. What was this racial problem? That's a pretty general term. What do you mean by racial problem?

A. As it applies in this case, it was the problem which grew out of the layoffs which were going to be made toward the end of the year. The reason why we call it a racial problem and the reason it probably was one was the fact that there were many more Filipinos involved in the layoffs than any other nationality, due to the fact that the preponderance of people engaged in that operation was

(Testimony of Caleb E. S. Burns.)

Filipino. I think 75 percent of the field work force was Filipino. They were all still made up largely of the new hires. So you had a racial group which was more seriously hurt in this layoff than a normal plantation action of any kind.

Q. As I understand it, by far the vast majority of field men were Filipino origin?

A. About 75 percent.

Q. So if you had to make a great cut in the field staff, it would be natural that they would be the ones most greatly affected because they were there in greater numbers, is that correct?

A. That is correct. [290]

Q. Is that what you mean by the racial problem?

A. This is correct.

Q. Anything else you mean by the racial problem?

A. Because this group was the group that was more seriously concerned, they in turn indicated at one time, I mean—I say “indicated”; we learned through the grape vine and through reports from our department heads and overseers that there was a very good chance that this group would not go along with the layoff program. I say “this group”; I am speaking of the entire Filipino group of employees now, as separated from the Filipino group that was going to be laid off. In other words, we had a situation which we felt was developing that could end up with our whole layoff program being completely thrown out the window.

Q. You say “this group wouldn’t go along.”

(Testimony of Caleb E. S. Burns.)

What would they do; how could they not go along?

A. By creating a strike or a stopwork or any other work action.

Q. You mean if in protest these people through the union called a strike, it would cause you embarrassment and cause you difficulties in operating, wouldn't it?

A. Wait a minute. I don't understand what you mean by "through the union."

Q. You think that these people would have called a strike not through the union? [291]

A. Yes.

Q. You do? A. Yes.

Q. What led you to that belief, Mr. Burns?

A. The activity of the group that was to be laid off in its relationship to the other people in our organization of the same racial extraction.

Q. What was the activity of that group?

A. This constant rumor, pressure, thing. I realize it sounds to you as though we were trying to avoid answering the question but it is not the situation. In a community such as a plantation community, where we all live in one place, we pick up information, as does everybody in it, and I cannot tell you so and so came in and told me that. If it were something of unusual importance that happened once, I would. But at our weekly department head meetings and that sort of thing, this thing was of constant discussion. I call it racial problem in its broad sense. Actually, it is a problem related to this group that was to be laid off

(Testimony of Caleb E. S. Burns.)

and their tie with other employees in our organization. [292]

* * * * *

Q. No. I am talking about the racial group. Now, you have this racial group, the Filipino group primarily, in the field, that you were going to lay off, primarily in the field, which was of concern to you as responsible management as to how they would take this and what the reaction would be? Right? A. That is correct. [293]

* * * * *

Q. When did you first consider that and talk about it in the higher eschelon of management in which you would be operating?

A. You mean the general program of mechanization or the——

Q. The effect upon this particular group [294] of employees who would be most directly affected in the first layoff.

A. Well, I can't pinpoint the exact time. The mechanization program—let me talk about that and then I will give you an idea as to when this probably came in.

Q. Yes.

A. We started talking possible mechanization early in 1951 and it took us a couple of years of working and experimenting to arrive at a method which we felt, from an operations point of view, would be successful.

* * * * *

Q. I realize this was a long range thing; it

(Testimony of Caleb E. S. Burns.)

wasn't something that happened over night. But there was a time when you arrived at the decision that it was feasible to mechanize, that being feasible, you would have to lay off certain people, and who those people would first be who would get the first, bear the first brunt of this layoff, the first impact. Right? A. That's right.

Q. Now, from that point, taking that as the point of departure for the purpose of our examination here, when did you come to that point in your determination that you decided there was going to be a layoff and that these people were the ones that were going to be affected? About when was that?

A. Let us say in December 1952 is when [295] we first got our money, our appropriation, for the mechanical equipment necessary. We knew it would take us, we hoped, 8 or 9 months from that date. We were up against a problem of keeping people cutting cane and operating on the hand-operating basis up to the time when mechanization took place.

* * * * *

Q. When did it first take place; when did you first begin to mechanize?

A. The first mechanical operation started this year. * * * * *

Q. When this year?

A. When we started up in February. February 2nd.

Q. All right.

A. But, to give you a clear picture, when we stopped harvesting, on December 17th, last year,

(Testimony of Caleb E. S. Burns.)

with the end of a large part of our hand operation, so people who were hand-cutters were terminated as of that date because we didn't harvest again until February. [296]

* * * * *

Q. All right. Now let's get to something more concrete, if we can, Mr. Burns. You say you made the decision yourself to discharge Banez?

A. That is correct.

Q. And you arrived at that decision when?

A. I would presume about November first.

* * * * *

Q. Did you look at Banez's work record?

A. Yes. [297]

Q. What did you look at, specifically?

A. I looked at his record as it applied to his job as a truck driver, first of all; what sort of a work record did he have; did he have any accidents, and how was he considered as a truck driver by our operating personnel who are in charge of that operation.

Q. You determined this from the file?

A. That is correct. And also in discussions with Mr. Mair, who was his department head, supervisor.

Q. Does Mr. Mair come in this now?

A. How do you mean "come in now"?

Q. Because I thought you were consulting Mr. West, Mr. Conant, and Mr. Lieth.

A. I also told you we consulted all our department heads.

(Testimony of Caleb E. S. Burns.)

Q. You mean all the department heads listed on Employer's Exhibit 4?

A. Correct. As I said, every Friday morning, when we have a department head meeting, those are the people that we discuss our various problems with. Now, every day, as I told you, we have the top group in for discussion. On this Banez case, Mr. West, Mr. Conant, Mr. Lieth were consulted. They were our top group. In addition I also talked to all the department heads on that matter.

Q. On this matter?

A. That is right. On Banez's discharge. [298]

* * * * *

Trial Examiner: What I want to know—here we have a group of big executives, Mr. Burns, and it doesn't sound very reasonable to me that you were discussing Banez in these executive meetings that you were holding mornings, every morning. Now, when did you start to discuss Banez and when did you end discussing Banez?

A. We discussed Banez off and on from about July or August.

Q. (By Trial Examiner Doyle): Until the time of his discharge? [299]

A. That is correct.

Q. Now, you had these meetings daily?

A. Let's divide the meetings up. First let's call our top group.

Q. All right, let's do that. Whom do you meet with daily?

A. West, Conant and Lieth, at that time.

(Testimony of Caleb E. S. Burns.)

Q. All right. When do you meet with the other men? A. Every Friday.

Q. In your daily meetings how many times a week did you discuss Banez?

A. I don't recall how many times a week.

Q. How many times a month did you discuss Banez?

A. I presume four or five times a month.

Q. I don't want your presumption. What's your best recollection, Mr. Burns? A. Five.

Q. You think you discussed Banez five times a month? A. That is correct.

Q. From June until December?

A. From August.

Q. From August until December.

A. No. May I correct that? From August until we fired him.

Q. That was December 17th, right?

A. Until we *made our* minds to fire him.

Q. You fired him on December 17th? [300]

A. That is correct.

Q. How many times did you discuss Banez in your weekly meetings? Did you discuss him at every meeting?

A. No, not every meeting. I am sure we discussed Banez at least once a month prior to October.

Q. What I am driving at, Mr. Burns, was Banez the most important business of the Olaa Sugar Company and its executive staff of high officials during all this period? A. Very close to it.

(Testimony of Caleb E. S. Burns.)

Q. (By Mr. Karasick): I gather, Mr. Burns, from July or August to the time Banez was discharged in December, you and other high officials of the company discussed his case roughly two dozen times, roughly, or thereabout? Would that be a fair estimate?

A. I think that is correct.

Q. May be a little more, may be a little less?

A. Yes.

* * * * *

Q. (By Mr. Karasick): I think you told us yesterday when this matter came to your attention through the union coming in, you requested Banez's work record and then you took it up with these officials you have told about today, is that right?

A. That is correct. [301]

* * * * *

Q. Did you personally look at it?

A. Yes.

Q. I see. And I take it if it hadn't been for this matter having been brought up on October 19th, you wouldn't have bothered to be looking at Banez's work record, is that right?

* * * * *

A. I don't know.

Q. (By Mr. Karasick): Do you normally—Let me put it this way. How many employees do you have at Olaa Sugar Company, total? [302]

A. About 1100, or we did have at that time.

* * * * *

Q. And you don't go through the work records

(Testimony of Caleb E. S. Burns.)

of these people even periodically unless something comes up which is of enough importance to make you as top man, manager of the plantation, interested, isn't that right? A. That is correct.

Q. So that you wouldn't have looked at Banez's work record unless this matter came up and seemed important to you? Right? A. That is correct.

* * * * *

Q. Isn't it correct, though, Mr. Burns, that this was the first time that you had looked at Banez's work record?

A. It is the first time that I had looked at his record, but I had reports before. [304]

* * * * *

Q. What was your decision based on?

A. The decision to discharge Mr. Banez? Is that your question?

Q. Yes.

A. First, on his record as an operator with us. His background problem associated — while he worked with us.

Q. His background problem. I am going to ask you a little more specific now on that, if I may. Do you want to finish first.

A. Let me finish first.

Q. Surely.

A. The serious effect we would have on our organization if this Filipino problem was allowed to gel, which I have outlined. You understand that. That is the situation of a group of people who certainly indicated they were not going to go along

(Testimony of Caleb E. S. Burns.)

with the layoff program as agreed to between the union and the company.

* * * * *

Q. I would like to direct your attention to a statement you made and ask you to explain it for the record, please. You [309] say this Filipino group indicated they were not going to go along with this layoff program. First of all, who from the Filipino group indicated that to you or any other representative of management?

A. No individual.

Q. All right. How did they indicate it?

A. The way that was indicated to us was through the information that our department heads and operating personnel picked up.

Q. Picked up from whom?

A. I presume in their day to day contacts with workers and people in the organization. It is most difficult to get across to you the tremendous importance we attach to this problem. This is not something that was a smoke screen or anything else. From my experience in the plantation game for almost twenty years, dealing with workers, I was certain in my mind that we had a problem, this growing split in our group of employees, which would completely ruin our program at Olaa. And I mean ruin the whole operation.

Q. It was a pretty critical problem for you, wasn't it? A. Very critical.

Q. It caused you a great deal of concern, right?

A. Absolutely.

(Testimony of Caleb E. S. Burns.)

Q. Did you make a direct investigation through your department heads or otherwise by going to the Filipino group and inquiring or finding out what the source of this problem was [310] and what the problem was, other than through the rumors or through the news filtering through on the grape vine, as you told us?

A. No, I did not go to the Filipino group.

Q. And you did not direct any of your supervisory staff to either?

A. I certainly did. Our supervisory staff was told to gather all the information they possible could on this problem. I think we all know what we are talking about when we talk about the "problem." This is this large group of people. We did not go directly to the group.

Q. Where did you go, Mr. Burns?

A. Where did I go?

Q. Where did your people go? I know you didn't get out and do it. You delegated it to someone, right?

A. That is correct.

Q. To whom and where did the people who were to investigate this matter—Did they investigate it?

A. The department heads were certainly looking at this problem from, as I have outlined this before, early in July.

Q. Did you direct any investigation of this problem by your department heads?

A. What do you mean by "investigation" in this case?

Q. You say you had a problem.

(Testimony of Caleb E. S. Burns.)

A. That is correct. [311]

Q. You say it was critical.

A. That is right.

Q. It was a matter of great concern.

A. That is right.

Q. Did you make an investigation to see what this problem was about and to get the details of it?

A. The problem was thoroughly talked through so many times that we did not go in to any detailed type of investigation.

Q. The answer is, then, is it not, Mr. Burns, and I merely want to know if this is true or not true, that you did not make an investigation of this problem through your staff or otherwise; isn't that correct?

A. If you speak of a full-dress investigation, you are correct. That statement is right. [312]

* * * * *

Q. (By Trial Examiner Doyle): Now, you say at one point, Mr. Burns, that you and the union had made some agreement as to a layoff procedure.

A. That is correct.

Q. What was that layoff procedure?

A. The original discussion—I will try and make this brief but I would like to give you the story.

Q. Yes. Let me put it this way. Perhaps we can make it brief by questioning you a little further. When you arrived at this layoff procedure, who were the participants in the conference to this agreement? How was it reached? Did you send for the union president or executive committee and

(Testimony of Caleb E. S. Burns.)

say, "Now, we have this problem. We are going to lay off men and we want to do it in an orderly fashion, with your cooperation"? [313]

A. That is just exactly the way the thing went. Now, I don't know when that discussion took place.

Q. From our knowledge of the way things are run in industrial organizations, you can take it for granted we know something about these things, and we would expect it to be done that way. All right. Now then, how were these layoffs to be effected? What I mean is this: What was the agreement between the union and the company? Were you to confer with the union as to who would be laid off in each department? Was that the way in which it was to be done?

A. No. There were general ground rules laid down that it would be on the basis of seniority or ability to do the job, with certain restrictions on the basis of, certain jobs were excluded on the basis of—Oh, like mechanics and skilled artisans and that sort of group did not come into this layoff group or force.

Q. But it was to be done on the basis of seniority and——

A. And ability to do the job.

Q. And ability to do the job?

A. That was the basic deal.

Q. Who was to be the judge of those elements?

A. We were the judge.

Q. You were to judge?

A. We were to judge.

Q. You were to make up seniority lists [314]

(Testimony of Caleb E. S. Burns.)

and you, the company, were to judge the ability of the men?

A. We discussed it with the union. We said, "These guys are the guys that are to go." There was one exception. There was a group of hardship cases. In other words, people with large families and certain hardship deals which were brought in by the union, and they asked us, "Well, can you exclude these guys?" And we said, "Yes."

* * * * *

Q. And as I understand it, now, you made this arrangement, you made this arrangement with the union and from some sources you were informed that a large segment of the workers were dissatisfied with the arrangements made with the [315] union, and yet you tell us that you made no inquiries to that group of employees as to the basis of their complaint? Is that what you tell us?

A. I tell you that we have made no formal investigation. That is correct.

Q. Well, as far as I get it, you understood that these Filipinos were dissatisfied with the arrangement that you had made with the union, and you feared that this disaffection or this disinclination to accept the agreement with the union would be widespread among all your Filipino employees.

A. That is correct.

Q. Yet you made no inquiry directed to them, the Filipino employees, as to what their complaint with the arrangement was. Is that the status? [316]

A. That is the status. * * * * *

(Testimony of Caleb E. S. Burns.)

Q. Just one other question. You answered me before that you talked about Banez on a great many occasions in your high level meetings to the extent of some five times a month. Did you consider that your troubles, in this regard stemmed from Banez's activity?

A. We thought so. And as time went along we became reasonably sure that they did.

Q. You didn't think that perhaps some of it stemmed from the situation itself, that people are reluctant to be laid off and don't like to be laid off?

A. Sure, we knew that.

Q. And they are annoyed when they see other people retained and they are laid off?

A. We knew that.

Q. As far as any action against any one of your employees of over a thousand, the only action taken against any of those was against Banez, is that right? A. That is correct.

Q. Was anybody else disciplined for creating this difficulty or problem? A. No. [317]

Trial Examiner: All right, Mr. Karasick.

Q. (By Mr. Karasick): How many Filipino field workers were there on December—in December, 1953?

A. I *have* the exact figures here. I think I can guess roughly. There were probably 700.

Q. Seven hundred. A. Filipinos?

Q. Filipinos.

A. Pardon me. That's about the total of our field group, I would say.

(Testimony of Caleb E. S. Burns.)

Q. All right.

A. And about 75 percent of that would be Filipinos.

Q. Who were employed during that season?

A. That is correct. [318]

* * * * *

Q. When was the layoff finally accomplished?

A. At the end of our season in 1953; about December 15th or 17th, something along that line.

Q. And at least 30 days and probably more than 30 days before that you managed to get your written letters out to your employees, to set them at rest so they would know where they stood; the ones that were to remain would know they were to remain, the ones that were to be laid off would know they were laid off, is that right?

A. I think we wrote a letter to both groups, the ones that were going to be laid off and the ones who were going to remain. [319]

* * * * *

Q. (By Mr. Karasick): Mr. Burns, you were good enough to check your files with respect to the letters we were speaking about before and you have given me a mimeographed letter of one page, at the bottom of which is in type the word "Sample copy of the letter sent to employees who would be terminated," which I have asked the reporter to mark as General Counsel's Exhibit 19 for identification. I will ask you if that is the form letter which was sent out by you and over your signature for the company to employees who were going

(Testimony of Caleb E. S. Burns.)

to be terminated during the period of time we are talking about?

A. This is the form letter that was sent out to all employees who were laid off.

Q. And the layoff was when you said; it was finally made on or about December 17th, but before that you thought it would [320] be a little early, is that correct? A. That is correct.

Q. And it is so shown by the dates of the letters that you hold, is it not, that you had contemplated an earlier layoff date?

A. That is correct.

Q. I also hand you another mimeographed letter, bearing your mimeographed signature at the bottom, which is typed "Sample copy of letter sent to those who were not going to be terminated," which I have asked the reporter to mark as General Counsel's Exhibit 20 for identification, and ask you if that is a form letter which you sent out to all employees who were going to be retained and not affected by the layoff at that time?

A. Yes. [321]

* * * * *

Q. (By Mr. Karasick): I hand you a mimeographed letter containing certain typewritten material similar to the, as a matter of fact, identical with General Counsel's Exhibit 20 for identification with the exception of the fact that this letter bears the salutation to Mr. Favorito Banez, Olaa, Hawaii, and contains other typewritten matter therein but

(Testimony of Caleb E. S. Burns.)

is otherwise the same as General Counsel's Exhibit 20 for identification. Is that correct?

A. That is correct.

Q. And the letter has a stamped date of October 28, 1953, that I handed you, is that correct?

A. That is correct.

Mr. Karasick: And this letter I have asked the reporter to mark as General Counsel's Exhibit No. 21 for identification. I herewith re-offer General Counsel's Exhibits 19 and 20 and offer General Counsel's Exhibit 21 in evidence. [322]

* * * * *

Trial Examiner: I will overrule the objection and accept the documents and direct that they be marked General Counsel's Exhibits 19, 20, and 21.

[See Exhibit 21 at page 307.]

* * * * *

Q. (By Mr. Karasick): When did the union next talk to you about the problem of Banez after October 19, 1953? A. I don't recall.

Q. How many times between October 19th and December 17, 1953, did they take up that question with you, talk to you about it?

A. About Banez?

Q. Yes.

A. They may have taken it up but I wasn't at any of the meetings. I don't remember being at their meeting where that subject came up again.

Q. But it was reported to you by your subordinates that the union had discussed the matter, either formally or informally, with various company offi-

(Testimony of Caleb E. S. Burns.)

ciala between October 19th and December 17, 1953, was it not? A. Yes. That is correct.

Q. And that was on several occasions at least, would be a fair statement, I take it? I don't ask you to give us the exact number. [323]

A. I really don't know.

Q. It was on more than one occasion, wasn't it?

A. As I recall the chain of events, once we decided to *hire* Mr. Banez, then the question of time came in. When should we do it? Here was a man we had decided to fire. Again, we were back up against the problem of if we took action and at an inopportune time, we may undo just what we were trying—we might create an event which we were trying to keep from happening.

Q. Was the event which you were trying to avoid creating the thwarting the desires of the union so that they might participate in a strike if you didn't fire Banez? A. No.

Q. Nothing like that? A. No.

Q. That never occurred to you, did it?

A. The arrangement we had with the union on the layoffs was agreed to; we had no reason to feel that that would not go along on the basis of our agreement.

Q. May I ask you, Mr. Burns, if you were asking the Examiner here to believe that you had no knowledge of the fact that the union was antagonistic to Banez?

A. No, I am not asking him to believe that.

Q. You knew that the union was?

(Testimony of Caleb E. S. Burns.)

A. Yes. [324]

Q. You knew that they brought this grievance and that they asked you to take action upon it, right?

A. Yes. They claimed that he was violating this section of the contract.

Q. And you knew that the action you would take would be derogatory in some manner or other to Banez's employment?

A. Certainly.

Q. That that would be necessary by the contract?

A. If we took action it would be.

Q. Yes. And ultimately you did take action?

A. That is correct.

Q. And the union did confer with various subordinate officials of the company on and after October 19th and before December 17, 1953, did it not?

A. I am certain they did.

Q. The matter was a rather, putting it in common parlance, a hot one at that time, wasn't it?

A. Certainly. It had been for a long time.

Q. I am talking about the matter of Banez now; are you talking about that, too?

A. I am talking about that problem and the related problem, which in our book is the same.

Q. We are talking about Banez, is that correct?

A. That's correct. [325]

* * * * *

Q. (By Trial Examiner Doyle): So that while no one, as I understand your testimony to be, and correct me if I am wrong, while no one said "We demand the discharge of Banez," at all times it was

(Testimony of Caleb E. S. Burns.)

clearly understood by everybody, as one of the union's men testified, they asked you to enforce section 1 against Banez because they believe Banez had violated section 1 of the contract?

A. They believed Banez had violated section 1 of the contract [326] and so stated to us.

Q. And you knew that their request was to enforce section 1 for either disciplinary action or discharge of Banez?

A. Actually, we had three alternatives: (1) Waive it completely; say we did not think they had any grounds for complaint; (2) to take some disciplinary action; and (3) discharge. Those were the three alternatives we had facing us.

Q. That is right. Well, when you said no request for discharge was made, I thought you meant as you now testify in those exact words, apart from the contract. At all times it seemed to me that everybody here had before them and in contemplation of this contract, and its enforcement.

A. Yes.

Trial Examiner: All right, Mr. Karasick.

Mr. Karasick: Thank you.

Q. (By Mr. Karasick): There at least is no question that the discharge was pursuant to the union's presentation of this matter under section 1 of the contract, as your letter states. Right?

A. That is right.

Q. As your two letters state. Right?

A. That is correct. [327]

* * * * *

(Testimony of Caleb E. S. Burns.)

Cross Examination * * * * *

Q. (By Mr. King): The company dealt with what representatives of the union in discussing this whole problem of the layoffs, who would be retained, who would not, and how were these hardship cases worked up? [330]

A. First of all, the initial discussion were held with the top union leadership, not only at the local level but with the regional director, and the general scheme of the layoffs was discussed and agreed to. Then on the hardship cases we were asked by the local leadership if an exception could be made to hardship cases. I don't know whether it was part of the original discussion or whether it came in shortly thereafter, but nonetheless it was a part of the total deal. And so we went along with hardship cases. And I think those discussions were held both with local leadership and the regional director.

Q. I will try and specify my question a little more, Mr. Burns. Can you tell the Examiner what body or committee the company dealt with as—that is, committee of the union—this company dealt with in this matter?

A. The union appointed a committee for this purpose.

Q. How large was that committee?

A. A relatively small committee.

Q. Approximately how many men, do you recall?

A. The reason why I hesitated to answer immediately was I think first of all it started out with

(Testimony of Caleb E. S. Burns.)

a fairly large committee and ended up with a small working committee. As I recall the group, there were 8 or 10 people, and then they had a small working committee that went over with our industrial relations director the people that were going to be laid off. Everybody knew who they were. [331]

Q. And that was in accordance with the seniority roster that the company carried in its office?

A. That is correct.

Q. Primarily. A. Primarily, that is right.

Q. And would you say it is a fact that in this first layoff in the middle of December the great majority of employees who were laid off were those with least seniority? A. That is correct.

Q. There were some exceptions based on the hardship cases, which involved men with families and so forth?

A. There were two exceptions, really. The hardship cases and the ability-to-do-the-job group. In other words, we had some new mechanics and people of that nature that did not get laid off. But in general it was on a seniority basis.

Q. If there were any stop-work meetings on the plantation so that the entire membership of the unit there, your employees, would meet, you would know about that as manager, wouldn't you?

A. Yes. [332]

* * * * *

Q. Isn't it true that in the early part of 1953 such a stop-work meeting was held for the purpose

(Testimony of Caleb E. S. Burns.)

of the union discussing this whole problem of the layoffs? [333]

* * * * *

A. I know that there was a stop-work meeting for the purpose of the discussion of these layoffs. I do not know the exact time, but I do know such a meeting was held prior to the layoff problem, prior to the layoff.

Q. And it was after that meeting that the union committee on this special problem began to meet with the company, is that correct?

A. Which special problem?

Q. This special problem of the layoffs, because of the conversion from hand harvesting to mechanical harvesting.

A. There were a number of meetings before the meeting of the general membership, I presume, because they were well informed of what the problem was. And a committee was then appointed to deal with us on the specific details of the layoff as I recall it.

Q. I will ask you again whether there was, to your knowledge, such a general stop-work meeting sometime in the month of [334] December, 1953?

A. There was.

Q. And do you know the purpose of that meeting?

A. As I understand, the purpose of the meeting was to ratify the completed layoff arrangement.

Q. And this was before the layoffs actually went into effect?

(Testimony of Caleb E. S. Burns.)

A. I don't know the exact timing of the meeting.

Q. It was about that time?

A. I would presume so, yes.

Q. Let me ask you, Mr. Burns: At this meeting of October 19, 1953, with the union grievance committee that came in on this problem of Mr. Banez, whether you took into consideration the company's duties under section 4 of the contract, which relates to no discrimination for race, creed or color, on the part of either of the contracting parties?

A. I don't understand. [335]

* * * * *

Q. Now, my question was, with respect to section 4, whether that particular section of the contract is what you took into consideration or one of the things you took into consideration in making such a statement?

A. I don't think at that moment I thought of section 4 of the contract, but the no discrimination part of the contract is a matter not only of our contract but it is a matter of our basic approach in dealing with our employees, and without question the racial problem or racial strife is something that we would not tolerate, could not tolerate.

* * * * *

Q. (By Mr. King): You testified, Mr. Burns, as to the problem that the company felt itself faced with, with respect to this racial antagonism, in connection with the proposed layoff. You have that well in mind? A. Yes.

(Testimony of Caleb E. S. Burns.)

Q. What was the anticipated problem that you had in mind?

A. The problem that we had, which I think is quite clear, is the fact that the Filipino group which made up a large part of our field force, which was the production force, the [341] cut cane group, with other people, with other Filipinos, were in a state or were getting, we felt, in a state whereby they would stop working. We, as outlined to you, had to keep a substantial number of these people on up until the deadline, because they were the harvesting people largely. They were also in the mill. But the primary problem was harvesting. And it was the fear on our part of action which would terminate production that was our basic worry, and it continues to be until all this layoff program is completed.

* * * * *

Q. (By Trial Examiner Doyle): Then am I to understand your testimony to be that you felt that there might be a strike or work stoppage by these Filipino workers and that you considered Banez the leader of the Filipino workers, and that therefore you discharged the leader of those employees at the request of the union? A. No.

Q. Well, now, what is your testimony?

A. My testimony is this: that (1) we had a growing difficulty with the Filipino group.

Q. We have been over all that. My point is this: You seem [342] to have feared so many things which were all attributed to Banez so that I would

(Testimony of Caleb E. S. Burns.)

like to know the mental operation of yourself, which has been gone into a great many times, you were on here yesterday and today and now at this point you say you feared a work stoppage which was not controllable by anybody.

A. That's the basic fear we had. Our primary problem was to keep operating at that stage of the game.

Q. Did I misunderstand your testimony all day yesterday, then, that that was your basic fear; that I didn't understand it to be that way at all?

A. I don't see that there is any—we haven't changed our—I haven't changed my testimony at all. I may not have gone on and told you the end product of what we were worried about, because nobody asked me. But the relationship between the Filipino group and employees was not a problem of ours until we were faced with the fact that we wouldn't operate if it continued. [343]

* * * * *

Q. (By Trial Examiner Doyle): I am not quite satisfied, Mr. Burns, with this testimony I have so far. I am not sure that I understand the situation at all. Now, as I understand it, you had reached a satisfactory arrangement with the union as to how these discharges were to be made.

A. That is correct.

Q. However, despite that, you heard rumors that a large segment of your employees were dissatisfied with the arrangements and that these employees were the Filipinos?

A. That is correct.

(Testimony of Caleb E. S. Burns.)

Q. And that Banez was at least one of those who was talking about the arrangement not being fair to the Filipinos? A. That is correct.

Q. And yet you at no time sent for Banez and asked him what he considered unfair about the arrangement or any other of the Filipinos and asked them what they considered unfair about the arrangement? A. That is correct.

Q. You entertained the committee of the union, received their complaint about Banez and their demand that Banez be disciplined or discharged pursuant to section 1, you took no action in regard to having Banez or any of the people who [344] might have been dissatisfied with your arrangement with the union into conference with yourself but discharged Banez, is that right?

A. That is right.

* * * * *

Q. (By Mr. King): Isn't it true, Mr. Burns, at that time, in 1953, the bargaining representative of your employees was the union unit up at Olaa?

A. That is correct.

Q. With whom you dealt in all these problems?

A. That is correct.

Q. And under the contract you could not deal with anyone else? A. That is correct.

Mr. King: That's all.

Trial Examiner: You see, that's the whole difficulty, Mr. King. A few moments ago the tack which you took was that the union and the company could not control these Filipinos and that the company

(Testimony of Caleb E. S. Burns.)

feared they would act without any reference to the union whatsoever, without any reference to the company, and would be sort of a lawless group in their action, [345] or at least take action without consulting the company. Now when they are confronted with this, you say the union was the representative and of course you only talk with the legal representative. That's what makes the situation somewhat un-understandable to me. You can't say at one time that this group is such an outlaw outfit that we fear what they will do and want to protect themselves against them, and yet on the other hand you say, "We have to go to the union; we can't do anything about this." Now, which is it? Are you dealing with a union or a segment of the union, who is a responsible party, or have you just got some nebulous fears, or what do you do in the circumstances? Just call one man in and fire him? It looks to me as though the conduct of the company isn't quite clear here to me.

* * * * *

Recross Examination

Q. (By Mr. Karasick): There were some 700 workers in the field during this past season in question, so far as you knew the majority and maybe all of those people were represented by the union, is that right? [346]

A. They are represented by the union.

Q. There isn't any question in your mind on that point?

* * * * *

(Testimony of Caleb E. S. Burns.)

A. They are the bargaining agent for all the workers. [347]

* * * * *

Q. You will recall that you wrote letters to Banez, telling him why he was discharged. Right?

A. That is correct.

Q. The two letters are General Counsel's Exhibits 15 and 16. Is that right? I hand you the two documents. A. Yes.

Q. It is perfectly correct that in neither of these two letters is there any mention made of section 4 of the agreement, is that not correct?

A. That is correct.

Q. But section 1 is mentioned, is it not?

A. That is correct.

* * * * *

Q. Did anybody at any time bring you information, and if so I want the specific information, that Banez ever told anybody that the layoff problem, policy, contemplated by the company or proposed by the company, was not fair to the Filipinos? [348]

A. We have no specific piece of paper or charge by any one individual. [349]

* * * * *

Redirect Examination * * * * *

Q. (By Mr. Collins): Mr. Burns, yesterday you testified to the effect that you had consulted the work record of Mr. Banez and had concluded that that record was a poor one. Is that correct?

A. That is correct. [357]

* * * * *

(Testimony of Caleb E. S. Burns.)

Q. I will show you the original of the document which has been photographed as Exhibit 7-A for identification. A. Yes.

Q. Was that document considered by you in arriving at your conclusion that Mr. Banez's work record was a poor one? [359]

A. It was.

Mr. Collins: I offer the exhibit marked 7-A for identification in evidence. [360]

* * * * *

Trial Examiner: That's right and that is the only reason for which I am receiving it.

(The document referred to, previously marked Employer's Exhibit 7-A, for identification, was received in evidence.)

[See page 311.]

Q. (By Mr. Collins): I believe you have testified that among the various documents constituting the work record of Mr. Banez which you examined, based upon which you reached the conclusion that he had a poor work record, was the document which has been received in evidence as Exhibit 7-A. I now show you a document which has been marked for identification as Exhibit 7-B, and ask you whether you have considered this document as part of that work record in reaching that conclusion?

A. Yes.

Mr. Collins: I offer the photographic reproduction of that document in evidence.

* * * * *

Trial Examiner: I will overrule the objection

(Testimony of Caleb E. S. Burns.)

and receive the document which is designated Employer's Exhibit 7-B for [364] the same limited purpose as stated in regard to the prior document.

(The document referred to, previously marked Employer's Exhibit 7-B for identification, was received in evidence.)

[See page 312.]

Q. (By Mr. Collins): Now, I show you a document which is marked Employer's Exhibit 7-C for identification, and ask you if this similarly is the same type of document found in the record upon which you based the same conclusion?

* * * * *

A. Yes.

Mr. Collins: I offer the photographic reproduction of that document as Exhibit 7-C.

Trial Examiner: I take it there is the same objection, and the same ruling, and it shall be received and marked Employer's Exhibit 7-C in evidence. This document is also received for the same purpose as stated by myself previously.

(The document referred to, previously marked Employer's Exhibit 7-C for identification, was received in evidence.)

[See page 312.]

Q. (By Mr. Collins): I now show you a document which has been marked Employer's Exhibit 7-D for identification, and ask you whether this document likewise was taken from the work record of

(Testimony of Caleb E. S. Burns.)

Mr. Banez and likewise is a document upon which you [365] based your conclusion that he had a poor work record.

A. Yes, this is the statement I reviewed.

Mr. Collins: This document has been photographed and has been marked by the reporter as 7-D on the first page and 7-E on the second page.

I offer this combined exhibit in evidence. [366]

* * * * *

Trial Examiner: I am going to overrule the objection and accept the document.

* * * * *

(The document previously marked Employer's Exhibits 7-D and 7-E was received in evidence. [367])

[See pages 313-314.]

* * * * *

(The documents referred to, Employer's Exhibits 7-G and 7-G for identification were received in evidence.) [368]

[See pages 315-316.]

* * * * *

Trial Examiner: Received in evidence and marked Employer's Exhibits 8-A and B.

(The documents previously marked Employer's Exhibits 8-A and B for identification were received in evidence.) [369]

[See page 317.]

(Testimony of Caleb E. S. Burns.)

Recross Examination

* * * * *

Q. (By Mr. Karasick): As his personnel record shows, there were certain advances and progressions in rate of pay and jobs, both before and after the various documents the respondent employer has introduced in evidence as Employer's Exhibits 7-A through 7-G, and those, for your information, are the disciplinary notices and [370] the various reports, both before and after those reports were made or those actions taken. Right?

A. Yes, I think that's true.

Q. Do you remember Mr. Banez being at one point confined to the hospital and thereafter, I think this was back in 1947 or '48, working in the hospital for a while?

A. Yes, I recall the record generally on that generally. That is what I understood it to be.

Q. Some sort of hospital attendant, is that correct?

A. That is so.

Q. And he worked there until there was a reduction in staff which necessitated the layoff of others and himself included. Right?

A. I believe that is correct. The hospital operation was reduced in scale and people were placed elsewhere in the plantation.

Q. And there is a notation of that—Pardon me. After that he was given another job with the company. Right?

A. Yes. Or transferred to another job.

Q. To another job. Yes. And then there was a

(Testimony of Caleb E. S. Burns.)

notation made in the file by the doctors in charge on August 18, 1948, with regard to Banez, is that not correct? A. Yes.

Q. And that notation said he was doing good work, including technical jobs? [371]

A. That is correct. [372]

* * * * *

Q. The company has a newspaper which it publishes from time to time, known as the Olaa News, has it not? A. That is correct.

Q. And is that paper published at the present time? A. Yes.

Q. How frequently?

A. Once a month, I believe.

Q. And has that been true for the past two or three years or more? A. I think it has.

Q. I direct your attention to a copy of the Olaa News for October 1953, which Mr. Collins has been good enough to produce, and call your attention to an article on the first page of that printed paper which contains the headline in bold type "Eighteen men promoted during August and September."

A. Yes.

Q. Is that correct?

A. That is correct. [373]

Q. Am I reading correctly from that, immediately thereafter the article begins, "The following employees were promoted during August and September: Favorito Banez, transportation handyman to senior cane truck driver."

A. That is correct.

(Testimony of Caleb E. S. Burns.)

Q. And that is the same Banez who is involved in these proceedings as complainant?

A. That is correct.

Trial Examiner: What date was that, Mr. Karasick?

Mr. Karasick: That was in the October 1952 issue of the newspaper. [374]

* * * * *

FAVORITO P. BANEZ

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination [386]

* * * * *

Q. (By Mr. Karasick): You worked for the Olaa Sugar Company from January 1946 to December 17, 1953?

A. That is right.

Q. In one capacity or another?

A. That's right.

Q. Do you remember, were you a member of the union when you first went to work for the company?

A. Yes, sir.

Q. By "the union" I mean ILWU, local 142?

A. Yes, sir.

Q. How long did you remain a member of the union?

A. Until the last part of 1951, I guess. That was when I was to take that cane truck driving job, new cane truck driving job. [387]

* * * * *

(Testimony of Favorito P. Banez.)

Q. In 1951, the latter part of 1951, from that time on, did you ever again sign a new check off authorization? A. I didn't.

* * * * *

Q. So, as I understand it, you were not a member of the union [388] in any way about that time until the time you were fired. Right?

A. That is right, sir. [389]

* * * * *

Q. (By Mr. Karasick): Did the union put out a bulletin with respect to the union shop issue with the company in 1951? A. Yes, sir.

* * * * *

Q. (By Mr. Karasick): I hand you a document entitled "Sugar Bulletin, Official, No. 1," issued by the ILWU, Local 142, June 6, 1951, which is a mimeographed document of one page, which I ask the reporter to mark as General Counsel's Exhibit 22 for identification, and ask you if that is one of the bulletins issued by the union on or about the date it bears with respect to the union's position concerning the union shop, as you understand it?

A. That is right. [392]

* * * * *

Q. (By Mr. Karasick): Were you opposed to the union shop?

A. I was entirely opposed. [393]

* * * * *

Q. (By Mr. Karasick): The question was, Mr. Banez: Did any official of the union talk to you

(Testimony of Favorito P. Banez.)

about your opposition to the union shop after that bulletin was issued?

* * * * *

A. Yes, sir.

Q. (By Mr. Karasick): Who was it?

A. It was Arakaki.

Q. The same man who testified here?

A. Yes, sir.

Q. Yasuki Arakaki? A. Yes, sir.

Q. And he talked to you about your opposition to the bulletin? Just answer yes or no. [395]

A. Yes, sir.

Q. It was some time after it was issued. Right?

A. Yes, sir. [396]

* * * * *

Q. (By Mr. Karasick): Mr. Banez, I hand you General Counsel's Exhibit 15, which is a letter notifying you of the fact that——

A. December 17, you mean?

Q. December 17, 1953, which is notice to you that your services were terminated by the company. When did you receive that letter?

A. On the afternoon of December 16. Yes, December 16. [410]

* * * * *

Q. Did you later see Mr. West? [411]

A. Yes. Later on.

Q. And was that on or about December 23, 1953?

A. About that.

Q. Where did you see Mr. West?

A. In his office.

(Testimony of Favorito P. Banez.)

Q. Who else was present?

A. It was only Mr. West in his office.

Q. Just the two of you? A. Yes, sir.

Q. Will you tell the Examiner as well as you can recall what the conversation was between the two of you on that day, and indicate whether you were talking or Mr. West was talking when you tell us what was said.

A. I went to him on that afternoon, asking him why I took that discharge paper, since I didn't ever know that I did anything wrong, at that very moment I received that discharge paper.

Q. Is what you are saying that you didn't until that moment know that you had done anything wrong? A. Yes, sir.

Q. And the moment is when you got the notice of discharge, is that right? A. Yes, sir.

Q. Is what you are saying that nobody ever talked to you about this before? [412]

A. Nobody. Nobody once.

Q. Had you received any warning from the company before? A. I didn't.

Q. Had not. Go on.

A. And I asked him the reason why and he related the facts that it was from the union, headed by Arakaki, it was a group of Filipinos headed by Arakaki who went to the office and file a grievance against me that I was disrupting the harmonious relationship of the workers.

Q. Do you recall anything else he said?

A. And he further state that I was—that griev-

(Testimony of Favorito P. Banez.)

ance was about the complaint against me that I was making or organizing another union. Also, that I was—that grievance was about me making or—yes, making camp meetings with the union members.

Q. Do you recall anything else he said in that connection?

A. And also he told me was a part of that grievance, he told me that I was claimed by the union that I went to see Bert Nakano; who that fellow was I don't know at that time.

Q. You say you don't know who the——

A. I didn't even know that time, who Bert Nakano. [413]

* * * * *

Q. (By Mr. Karasick): Did Mr. West at any time during this meeting make any mention to you of your work record?

A. No, sir. [415]

* * * * *

Q. (By Mr. Karasick): What else did Mr. West say to you at this meeting?

A. Relating to me those grievances filed by the union against me. I told him, "Don't you think, Mr. West, that this grievance was a kind of frame up?" That is what I said.

Q. Did he reply? [416]

A. He replied, he shook his shoulder and his mind, see.

Q. He shrugged his shoulders, is that what you mean?

A. That I don't know. That's what he said, see. (Indicating.)

(Testimony of Favorito P. Banez.)

Q. Did he say anything else to you?

A. He advised me if I was not contented the answers he had given at that time I could file my grievance, see, according to the grievance machinery, but if I would not be satisfied with the grievance and would go to arbitration, he further told me that it would cost me big money, see. [417]

* * * * *

Cross Examination

Q. (By Mr. Collins): Mr. Banez, I direct your attention to the meeting with Mr. West, to which you referred as happening on or about December 23, 1953. I ask you to state exactly what was said by yourself, by Mr. West, concerning your discharge. [423]

* * * * *

A. On December 16 I was discharged; they handed me that discharge paper. When I went on that December 23rd to ask what was going on about that discharge they handed me, they told me that the union claimed, headed by Arakaki, with a group of 23 men——

* * * * *

Q. (By Mr. Collins): Go ahead, please.

A. Twenty-three men, filed grievance against me that I was disrupting the harmonious relationship of the workers. Further he said the union claimed that I was making another union.

* * * * *

A. (Continuing): Making camp meetings. I

(Testimony of Favorito P. Banez.)

went to see Bert Nakano. Who I didn't know at that time, who was Bert Nakano.

I asked Mr. West if those grievances were not a frame up.

* * * * *

A. He shook his shoulder and he smiled. And after that he advised me that if I was not contented of that reason he has given me at that time I would file my grievance through the grievance procedure. [424]

* * * * *

Q. (By Trial Examiner): Did you file a grievance? A. I didn't.

* * * * *

Q. If anything else was said by you or Mr. West at that meeting we want to hear what it was.

A. That if I would file my grievance, I would go to arbitration, but if I would go to arbitration it would cost me big money, so that I did not continue filing my grievance. And furthermore, what Mr. West told me was even though I won, or even though I would be successful in the grievance, it would be useless just the same. [426]

* * * * *

NELSON L. WEST

a witness called by and on behalf of respondent employer, Olaa Sugar Company, Ltd., having been previously duly sworn, was examined and further testified as follows:

(Testimony of Nelson L. West.)

Direct Examination

* * * * *

Q. (By Mr. Collins): Do you recall a meeting with Mr. Banez on or about December 23, 1953?

A. Yes, I do.

Q. Will you tell the Examiner as best you can recollect exactly what Mr. Banez said to you and what you said to Mr. Banez at that meeting?

A. Mr. Banez came to see me. He originally asked for a meeting with Mr. Burns. Mr. Burns was in Honolulu at the time that Mr. Banez wanted to see him, and he asked me to interview Banez in his stead. Mr. Banez came to my office, it was in the afternoon if I recollect right, and asked me why he was discharged. I told Mr. Banez that the union had filed or had brought up a grievance to the company and we had held at their request a meeting, that there were some twenty-odd members present at this meeting, and they had brought out at this meeting that he — Banez — was disrupting harmonious relationships with the company, by circulating petition against the officers of the union and was fostering racial discontent among the Filipinos, claiming that the Japanese were getting all the breaks in this layoff procedure that we were in the middle of.

I also told Mr. Banez that his work record at Olaa had been very poor. And Mr. Banez reviewed his long disagreement with the union over many issues which he brought out, such as the union shop, claiming that the union officers were out to get him,

(Testimony of Nelson L. West.)

and had brought this action against him for that reason. I told him that it was no concern to the company what the internal affairs of the union were and we were not interested [428] in it, but we were sincerely disturbed by this charge of racial, stirring up of racial discontent.

Mr. Banez asked me what he could do in regard to this discharge. I told him that the steps of the grievance procedure were open to him. I also told him that if he took the grievance procedure to its final conclusion, which would be arbitration, that he could not possibly expect the union to pay for the cost of the arbitration since they had brought these charges against him, and that it would cost him, would be of some cost to him to take this matter to arbitration.

Mr. Banez asked me whether there was any charges made by other than the officers. I told him that there were approximately twenty people there and that various members of this union committee had stood up and given testimony in regard to his actions. That testimony was covered by Mr. Isherwood in his testimony and is correct as he gave it.

I also told Mr. Banez that if he took this matter through arbitration and was successful in regaining employment with the company, that he would still have to live with the people on the plantation there, and giving him a little advice I said that he would probably be happier if he didn't spend this money to go to arbitration and maybe attempted to find employment elsewhere.

(Testimony of Nelson L. West.)

Mr. Banez agreed with me, said that he wanted to stay and fight the union, bringing up other matters such, as he [429] put it, communist led union; that they were out to get him and he was there, was going to stay there, and fight this matter to a final conclusion.

I think in general that is the gist of the meeting.

* * * * *

(Whereupon, at 4:30 p.m., August 25, 1954, the hearing was closed.) [449]

GENERAL COUNSEL'S EXHIBIT No. 14

Agreement Between Olaa Sugar Company, Limited
and United Sugar Workers, I.L.W.U., Local
142, Effective September 1, 1951, As Amended
October 29, 1952.

* * * * *

SECTION 1

Recognition and Union Security

The Company recognizes the Union as the sole and exclusive collective bargaining agent for all of the employees covered by this agreement.

The Company further recognizes the rights and obligations of the Union to negotiate wages, hours and conditions of employment, and to administer this agreement on behalf of all covered employees.

The Company recognizes the right of the Union to be present at the adjustment of any grievance arising under this agreement. The Company shall

notify the Union promptly of any grievance filed in writing or at Step 2 of the grievance procedure in any event, and shall provide an opportunity for a Union observer to be present at the adjustment of such grievance.

The Company and its representatives will not undermine the Union or promote or finance any competing labor organization.

The Company and its representatives will not interfere with the right of any employee to join the Union, and will make known to all employees that they will secure no advantage, more favorable consideration, or any form of special privilege because of non-membership in the Union.

The Company and its representatives will make known to all employees its policies and commitments as set forth above with respect to recognition of the Union and that employees in the bargaining units should give the utmost consideration to supporting and participating in collective bargaining and contract administration functions. New hires shall be given a copy of the agreement and advised of the Company policy on recognition and union security. All Company and Union representatives will make every reasonable effort to settle grievances and contract problems in a way to promote orderly administration of the agreement.

Any claim that the Company has shown favoritism or granted special privileges to a non-union employee in violation of the agreement shall take priority over other pending grievances.

Any claim by the Union that action on the job of

a non-union employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruption of harmonious working relations shall be grounds for discipline or discharge.

It is recognized that the limitations set forth herein relate only to actions on the job.

SECTION 2

Duration

This agreement shall become effective on the date of its execution and shall remain in effect until August 31, 1954. It shall be deemed renewed thereafter from year to year unless either party hereto gives written notice to the other party hereto of its desire to amend, modify or terminate the same, which notice shall be served not earlier than seventy-five (75) days nor later than sixty (60) days prior to said expiration date, in which event negotiations shall begin within fifteen (15) days from date of notice.

* * * * *

SECTION 3

Employee Coverage

The employees covered by this agreement are all production, maintenance and agricultural employees of the Company with the exception of employees in those categories which are specifically excluded in subsection (e) hereof. Such covered employees are divided into the following designated bargaining units:

(a) Unit 1. Those employees of the Company (1) engaged in transportation; (2) engaged in and about the processing mill and mill yard, including such operations as scaling, loading, unloading, washing, handling, cleaning, grinding, heating, liming, clarification, filtration, evaporation, graining, drying, bagging, sewing, shipping, warehousing and delivery, molasses handling, and chemical control, steam and power production, including hydroelectric plant employees; (3) engaged in repair, maintenance and new construction;

(b) Unit 2. Those employees of the Company engaged in grounds and village maintenance and services, merchandising, and employees in the milk room on dairy ranches, and milk delivery employees;

(c) Unit 3. Those agricultural employees of the Company who are engaged in clearing and preparation of land, preparation and transportation of seed, planting, cultivating, irrigating, fertilizing, spraying with herbicides and insecticides, harvesting, including the loading of the agricultural products onto the initial means of transporting them from the fields, and the care of animals used in cultivating and harvesting; and also employees in ranch and dairy operations, except employees in the milk room on dairy ranches and employees engaged in milk delivery;

(d) Unit 4. The employees of the Company engaged in operations within Unit 4 as established in the election conducted by the National Labor Rela-

tions Board, while such employees are holders of jobs listed in Exhibit B-1 hereof;

* * * * *

SECTION 16

Stop-Work Meetings

At the written request of the Union made at least one (1) week in advance, a stop-work meeting of not more than four (4) hours' duration shall be arranged for all employees covered by this agreement. There shall be not more than three (3) stop-work meetings during each contract year; provided, however, any stop-work meeting held for the purpose of ratifying a new agreement between the Company and the Union may be held in addition to the three (3) stop-work meetings hereinbefore specified. The date and hour of such meeting shall be arranged by mutual agreement between the Company and the Union. The Company shall not schedule any work during such meetings except work necessary for the health and safety of employees and their dependents, and work necessary for the safety of equipment or the preservation of materials in process. If employees attending the meeting are required to return to work thereafter, they shall return promptly. Where other means are not available, the Company will cooperate in making transportation available. However, the cost of providing transportation in excess of normal transportation to and from work will be borne by the Union. Employees shall not receive any compensation for hours not worked.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 15

Olaa Sugar Company, Limited
Olaa, Hawaii, T. H.

Mr. Favorito Banez December 17, 1953
Olaa, Hawaii

Dear Sir:

This will be notice to you that your services will no longer be required by Olaa Sugar Co., Ltd. on and after December 17, 1953.

This action is taken as a result of your actions in violation of Section 1 (Recognition and Union Security) of the Agreement between Olaa Sugar Co., Ltd. and the United Sugar Workers, ILWU Local 142, as brought to our attention by the Union.

Yours truly,

OLAA SUGAR COMPANY,
LIMITED,
/s/ C. E. S. BURNS, JR.,
Manager.

NLW:kn

GENERAL COUNSEL'S EXHIBIT No. 16

Olaa Sugar Company, Limited
Olaa, Hawaii, T. H.

Mr. Favorito P. Banez January 7, 1954
P. O. Box 332 Olaa, T. H.

Dear Sir:

The reason for your discharge as of December 17, 1953 was as stated in our letter of December 17,

1953 — violation of Section 1 (Recognition and Union Security) of the Agreement between this company and the United Sugar Workers, ILWU Local 142, as brought to our attention by the Union.

The details of this violation, as presented to us by the Union, were explained to you at the time of your meeting with Assistant Manager West on December 23, 1953.

Very truly yours,

OLAA SUGAR COMPANY,
LIMITED,

/s/ C. E. S. BURNS, JR.,
Manager.

CESBjr:kn

GENERAL COUNSEL'S EXHIBIT No. 17-A

Olaa Sugar Company, Limited
Independent Grower Agreement

* * * * *

Witnesseth: That The Mill, in consideration of the covenants and agreements of the Grower, hereinafter contained, and of the sum of Ten Dollars (\$10.00) to the Mill paid by the Grower, receipt whereof is hereby acknowledged, does covenant and agree with the Grower as follows:

Section 1. Purchase of Cane — Description of Land—Term of Agreement: That the Mill will purchase from the Grower all sound, mature sugar cane of varieties approved by the Mill (excluding all dry and sour sugar cane, tops, leaves, earth, trash and

other extraneous matter, hereinafter called "tare") grown, brought to maturity, cut and piled by the Grower or for his account, as herein provided, on that piece or parcel of land (which the Grower warrants to be under his ownership or control) situated in the District of Puna, County of Hawaii, containing an area of acres, more or less and more particularly described as follows:

for such period as will be required to complete the growing and to harvest and deliver the crop or crops of sugar cane now being and growing upon the said land at the date hereof, and thereafter from crop to crop unless written notice of the termination of this agreement as to any subsequent crop shall have been given by either party hereto to the other at a time prior to or within thirty (30) days after the completion of harvesting of any crop grown hereunder.

Section 2. Delivery — Loading — Transporting: That the Mill will take delivery of the crop or crops of sugar cane now growing or to be grown during the term hereof, cut and piled by the Grower (or cut and piled by the Mill at his request and expense) on slings within three hundred (300) feet of a passable road as provided herein upon the land covered hereby, providing and delivering cable slings to roadsides as necessary, maintaining field roads, hauling sugar cane bundles to roadsides, loading said bundles on to trucks provided by the Mill and transporting said sugar cane to the factory of the Mill at the expense of the Mill, all at the time or

times designated by the Mill feasibly nearest to the time of maturity of said crop or crops having due and equitable regard for the crops of the Mill and of other Growers whose crops shall mature at approximately the same time, and also having due and equitable regard for suspensions of this agreement arising under Section 14 hereof and for such Governmental regulations or voluntary agreements as may affect the annual quota of sugar allocated to the Hawaiian sugar industry or to the individual farming units.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 17-B

Olaa Sugar Company, Limited

Temporary Amendment to Independent Grower
Agreement

* * * * *

Witnesseth: That, in consideration of the mutual covenants herein and in the abovementioned Independent Grower Agreement contained, the Mill and the Grower do mutually agree that the said agreement, as previously twice amended, shall be and it is hereby temporarily amended in the following manner:

(1) Section 1 is hereby amended to read as follows: "Section 1. Purchase of Cane—Description of Land—Term of Agreement: That the Mill will purchase from the Grower all sound, mature sugar cane of varieties approved by the Mill (excluding all dry and sour sugar cane, tops, leaves, earth,

trash and other extraneous matter, hereinafter called "tare") grown, brought to maturity, cut and piled by the Grower for his account or mechanically harvested, all as herein provided, on that piece or parcel of land (which the Grower warrants to be under his ownership or control) situated in the County and Territory of Hawaii, containing an area of acres, more or less, and more particularly described as follows:

for such period as will be required to complete the growing and to deliver the crop or crops of sugar cane now being and growing upon the said land at the date hereof, and thereafter from crop to crop unless written notice of the termination of this agreement as to any subsequent crop shall have been given by either party hereto to the other at a time prior to or within thirty (30) days after the completion of harvesting of any crop grown hereunder".

(2) Section 2 is hereby amended to read as follows: "Section 2. Delivery — Harvesting — Transporting: That the Mill will take delivery of the crop or crops of sugar cane now growing or to be grown during the term hereof, cut and piled by the Grower on slings within three hundred (300) feet of a passable road as provided herein upon the land covered hereby, furnishing and delivering cable slings to roadsides as necessary, maintaining field roads, hauling sugar cane bundles to roadsides, loading said bundles on to vehicles provided by the Mill and transporting said sugar cane to the factory of the

Mill at the expense of the Mill, all at the time or times designated by the Mill feasibly nearest to the time of maturity of the said crop or crops, having due and equitable regard for the crops of the Mill and of other growers whose crops shall mature at approximately the same time, and also having due and equitable regard for suspensions of this agreement covered by Section 14 hereof and for such Governmental regulations or voluntary agreements as may affect the annual quota of sugar allocated to the Hawaiian sugar industry or to its individual farming units, provided however, that should the Mill undertake to perform the harvesting operations required of the Grower herein at the request of the said Grower, then in every such case the Mill shall have the right, in its sole discretion, to determine the method whereby the said operations shall be performed, either by hand cutting and piling as described herein, in which case the said operations shall be fully at the expense of the Grower and delivery of the said sugar cane shall be taken by the Mill at the point above described, or alternatively by such mechanical methods as the Mill may select, in which case such harvesting operations shall be fully at the expense of the Mill and delivery of said sugar cane shall be taken by the Mill at the point of severance from the ground of the said crop or crops at time of harvest, and subsequent loading and transporting operations shall be performed by the Mill at its expense by any methods compatible with the selected method of mechanical harvesting”.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 21

Olaa Sugar Company, Limited
Olaa, Hawaii

Mr. Favorito Banez
Olaa
Hawaii

October 28, 1953

Dear Mr. Banez:

As of the present date, it is anticipated that Mechanical Harvesting will become effective on or about November 15, 1953. On the effective date, all of the necessary changes in personnel will also be made. You will be notified by your Supervisor as to the exact date of the changeover. On that date you will be assigned to the job of Sr. Cane Truck Driver and your supervisor will be Mr. Furukawa.

Very truly yours,

OLAA SUGAR COMPANY,
LIMITED,
/s/ C. E. S. BURNS, JR.,
Manager.

MOI:hn

EMPLOYER'S EXHIBIT No. 5

Job Description

Date: June 9, 1952

Olaa Sugar Company, Limited

Job Title: Senior Cane Truck Driver

Department in Which Job Is Located: Harvesting

Summary of the Job: Under general supervision,

drives a cane truck pulling a full trailer with payload capacity equal to or greater than that of the truck; hauls cane between harvesting field and Mill Yard; does other work as directed by supervisor

Work Performed:

1. Drives a cane truck under variable conditions on highways, plantation roads and fields, pulling a trailer from harvesting field to mill yard, total load approximately twenty-four (24) tons.

2. Observes all safety rules and regulations; drives carefully, maintaining proper prescribed speed at all times.

3. Maintains proper air pressure in tires, works with tireman in the changing of tires as necessary; observes oil pressure and temperature gauges; checks fuel supply and crankcase oil; occasionally cleans truck; services truck by filling radiator with water; makes minor repairs and adjustments such as tightening loose bolts and nuts.

4. Trims, with cane knife, cane protruding from sides of cane truck.

5. Unloosens sling hooks on cane bundles as required, helps with Tomonaga hooks, and removes empty slings from boom chain hooks.

6. After cane bundles have been removed from truck, cleans out truck compartments by using pitchfork and/or by hand.

7. Reports to supervisor all mechanical defects requiring repair by motor mechanics.

8. Occasionally tows other equipment as required.

9. Assists motor mechanics in the capacity of a helper while truck is being repaired.

10. Does other work as directed by supervisor.

Supervision Received: General from supervisor.

Tools Used: None.

Equipment Used: Truck, trailer, cables (slings), cane knife, pitchfork.

Materials Used: Gasoline, oil, and water.

Reports and Records Prepared: Daily truck report.

Education Required: Read, write, and speak English.

Experience Required: Approximately one year on the job to perform work satisfactorily; ability to operate heavy cane truck with semi and full trailer; County of Hawaii vehicle operator's license.

Initiative Required: Very little—routine work.

Physical Effort Required: Continuous driving of heavy cane truck with fully loaded semi and full trailer.

Mental Effort Required: Ability to follow instructions; attention to gauges and mechanical operation of truck while driving.

Visual Attention Required: Continuous while driving on field and main roads in order to minimize accidents.

Resp. for Tools and Equipment: Proper use and care of truck, trailers and sling, cane knife, and pitchfork.

Resp. for Material and Product: Proper operation of unit to prevent excessive wear of truck due

to carelessness; prompt delivery of cane from harvest field to mill yard.

Resp. for Confidential Data: None.

Resp. for Reports and Records: Daily truck reports.

Working Conditions: Continuous driving; continuous vibration or noise; occasionally dusty; occasionally hot; constricted working space; drives truck in all kinds of weather and over various types of roads.

Unavoidable Hazards: Subject to lost-time accidents such as cuts, bruises, broken bones and eye injury; ditching, jack-knifing, or overturning of truck and trailer due to poorly constructed road shoulders; tire blow-outs.

Job Description Prepared by: JDC. Approved: MOI.

EMPLOYER'S EXHIBIT No. 6

Figures for Year 1953

Total traveling hours of trucks: 33,632

Total truck trips: 25,913

Average traveling hours per truck trip: $33,632 \div 25,913 = 78$ minutes

Average time from arrival of truck at field to completion of loading: 59.07 minutes

Travel Time per trip: 78 minutes

Unloading Time per trip: 18.11 minutes

Average time of complete trip: 2 hrs. 35.18 minutes = 155.18 min.

Percent of trip time spent in actual travel: $78 / 155.18 = 50.27\%$

Percent of time in fields loading and unloading
exclusive of transportation over farm roads: 49.73%

EMPLOYER'S EXHIBIT No. 7-A

Olaa Sugar Company, Limited

Date: July 24, 1953

Disciplinary Lay-Off

Employee's Name: Favorito Banez; Work No.:
1956; Dept.: Harvesting.

* * * * *

You are hereby suspended without pay for a
period of Two (2) days effective July 27, 1953 for
the following reason:

On July 12, 1953 you were involved in an accident
caused by your entering the Pahoa road from a side
road, causing considerable damage to a private car.

Should you not report for work on July 29, 1953
or when notified, or notify your Supervisor of your
inability to report your absence will be considered
your resignation and your name will be dropped
from the seniority roster.

/s/ FAVORITO P. BANEZ

Employee's Signature

/s/ T. FURUKAWA,

Supervisor

/s/ GEO. MAIR,

Department Head

(Refused to sign),

Steward's Signature

/s/ M. O. I.,

Ind. Rel. Dept.

EMPLOYER'S EXHIBIT No. 7-B

Olaa Sugar Company, Limited

Date: 10/9/50

Disciplinary Lay-Off

Employee's Name: F. Baniez; Work No.: 1956;
Dept.: Mill.

You are hereby suspended without pay for a period of Two Days and 2 Hrs. effective at 1:00 p.m. Oct. 9, 1950, for the following reasons:

Fighting on the job, and inflicting bodily injury.

Should you not report for work on Oct. 12 or when notified, or notify your Supervisor of your inability to report, your absence will be considered your resignation and your name will be dropped from the seniority roster.

/s/ FAVORITO P. BANEZ,

Employee's Signature

/s/ P. P. FRENDON, SR.,

Supervisor

/s/ WM. LEITH,

Department Head

/s/ M. O. I.,

Ind. Rel. Dept.

EMPLOYER'S EXHIBIT No. 7-C

Olaa Sugar Company, Limited

Date: Dec. 16, 1952

Disciplinary Lay-Off

Employee's Name: F. P. Baniez; Work No.: 1956; Dept.: Harvesting.

You are hereby suspended without pay for a period of One (1) Day effective Dec. 17, 1952 for the following reasons:

Negligence; dragging full load of cane for three miles with semi-trailer's left dual tires and wheels detached and load riding on brakedrum, swaying precariously.

Should you not report for work on Dec. 18, 1952 or when notified, or notify your Supervisor of your inability to report, your absence will be considered your resignation and your name will be dropped from the seniority roster.

/s/ FAVORITO P. BANEZ,

Employee's Signature

/s/ T. FURUKAWA,

Supervisor

/s/ GEO. MAIR,

Department Head

/s/ M. O. I.,

Ind. Rel. Dept.

EMPLOYER'S EXHIBIT No. 7-D-E

Aug. 28, 1952

George Mair, Harvesting Supt.

Yesterday on 2nd shift, on Mt. View Run, #1956 F. P. Baniez, driving truck 600 with trailers 1809 and 1916. The first driver to leave for Mt. View at 1:30 was directed by myself to go into Kulani Rd. and watch and follow arrows pointing the way into the harvesting field and to the loader. Baniez went

up to Kulani Road okay but missed the arrow leading to the loader and came on down until he came out on the Volcano Road. Instead of going back up to Kulani Road again, came down to Mill Yard empty. On checking with Checker K. Kamei on radio, Kamei said he personally checked arrows and they were all okay. On hearing this I strongly reprimanded Baniez and told him to go back and watch arrows closely and that he should have known better, that on missing the arrows and on coming out on Volcano Road, he should have gone back to Kulani Road and find the right arrow.

I found out later that Baniez on going back to Kulani Road could not find arrow leading down into the harvesting field and he was waiting on the road until Mr. Conant came along and he had to lead Baniez into the field. Loader waited 47 minutes for 2nd truck and Baniez reached loader at 3:27 p.m. whereas he should have been there at about 2:10 p.m.

Baniez had no excuses to miss arrows because arrows were all posted and he was 3 days on this Mt. View Run already. Baniez does not admit that he missed arrows but that arrows were not there so he was strongly advised to admit when he makes a mistake like a man and today, before he left for Mt. View, I told him to watch arrows closely and listen to instructions until he understands them and that if anything like this happens again, he will be suspended or some other action will be taken.

/s/ T. FURUKAWA

EMPLOYER'S EXHIBIT No. 7-F

Aug. 8, 1952

George Mair, Harvesting Supt.

Last night on the 2nd shift, #1956, F. P. Baniez driving truck 609 with trailers 1801 and 1903, leaving empty from mill yard for Field 8- Mt. View, went up until the Kesan Store with 2 wheels on full trailer locked. He forced truck to go ahead because with 2 wheels not turning around a driver is supposed to feel the weight on his steering wheel. He stopped at Kesan Store because he heard a tire blow out and when the tire boy went up to repair it, he found 2 tires flat caused by wheels not turning. This 2 tires was thrown away because it was worn out only in one place and could not be used.

Baniez was strongly reprimanded verbally by (illegible) and myself and was told that we did not want anything like this to happen again because it involves lots of money and time wasted. I advised him to stop and check if he thinks or feels anything wrong with the operations of his truck.

/s/ T. FURUKAWA

EMPLOYER'S EXHIBIT No. 7-G

April 2, 1952

Mr. George Mair, Harvesting Supt.

Last night on 2nd shift, Mt. View Run, Field 6 #1956, F. Banez, a trained driver, driving truck 606 with trailers 1806 and 1914 got stalled in field road, empty and before reaching loading field because of broken axle Driver did not go back to flag next truck and try and reroute trucks on next road so next truck driven by #1511 George Chiquita came into same road and got stuck behind. George Chiquita after finding out what was wrong, immediately walked out to entrance of road and stopped next truck following. He told 3rd truck's driver to take next road and at the same time to have Checker report to Control about truck breakdown. Mechanics came up and managed to move Truck 606 enough to clear road and left truck to be repaired next day.

Banez was reprimanded about not trying to stop next truck from coming into same road. He was told not to let it happen again because it will involve lots of time lost. At the same time, George Chiquita was commended on his fast thinking.

/s/ T. FURUKAWA

OLAA SUGAR COMPANY, LIMITED

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OLAA, T. H.

EMPLOYEE SERVICE RECORD

EMPLOYER'S EXHIBIT 8A, B

Social Security Number 515-26-772

1. NAME BANEZ, FAVORITO PASCUA

Last

First

Middle

JOB RECORD

JOB	POSITION	RATE OF PAY	KEY	INCLUSIVE DATES		SERVICE CREDIT			KEY
				From	To	Yrs.	Mo.	Days	
	Cut cane		A	2/4/46	3/5/46	1	1		B
	CCC Car Ten.			3/5/46	11/19/46	8	14		B
	CCC Tender	.740		11/19/46	2/11/47	2	23		B
	L. Cent. Opr.	.785		2/11/47	8/1/47	6	21		B
		.865		8/1/47	9/18/47	1	18		T
	Resp. Att.	.82		9/18/47	2/3/48				
	Ord.	.865		9/1/48	10/7/48	1	6		T
	Cane Cut.	.82		10/7/48	12/20/48	2	13		C
		.815		12/20/48	1/19/49	1			T
	Fing. lift opr.	.815		1/9/49	2/28/49	1	17		J

A—Commenced. B—Upgraded. C—Reduced. D—Discharged. E—Resigned.

G—Returned. H—Reinstated. J—Leave of Absence without pay.

K—Military Service.

JOB	POSITION	RATE OF PAY	KEY	INCLUSIVE DATES		SERVICE CREDIT			KEY
				From	To	Yrs.	Mo.	Days	
	Finger lift operator	.86		2/28/49	3/27/50			27	B
	Finger lift operator	.925		3/27/50	10/15/50	6	19		T
	Cane Cutter	.88		10/16/50	12/15/50	2	9		T
	Utility Electrician Trainee I	.80		12/16/50	6/24/51	6			B
	" " (or II)	.835		6/25/51	8/1/51	2	6		B
	Utility Electrician Trainee (I)	.945		9/1/51	10/30/51	2	8		T
	Milled Scaleman	.945	T	10/31/51	11/15/51			26	T
	CANE CUTTER	.945	T	11/16/51	2/1/52	2	13		TC
	Gr. Trees. Handyman	.945	TC	2/1/52	6/7/52				B

Key: A—Commenced. B—Upgraded. C—Reduced. D—Discharged. E—Resigned.

G—Returned. H—Reinstated. J—Leave of Absence without pay.

K—Military Service. T—Transferred.

JOB	POSITION	RATE OF PAY	KEY	INCLUSIVE DATES		SERVICE CREDIT			KEY
				From	To	Yrs.	Mo.	Days	
	SENIOR CANE TRUCK DRIVER	1.17	B	8/1/52	8/3/52				B
	" "	1.28	B	9/1/52	12/17/53				D

NATIONAL LABOR RELATIONS BOARD

EMPLOYER OFFICIAL EXHIBIT NO. 8-A

DISPOSITION

IDENTIFIED
R.C.I.V.D.

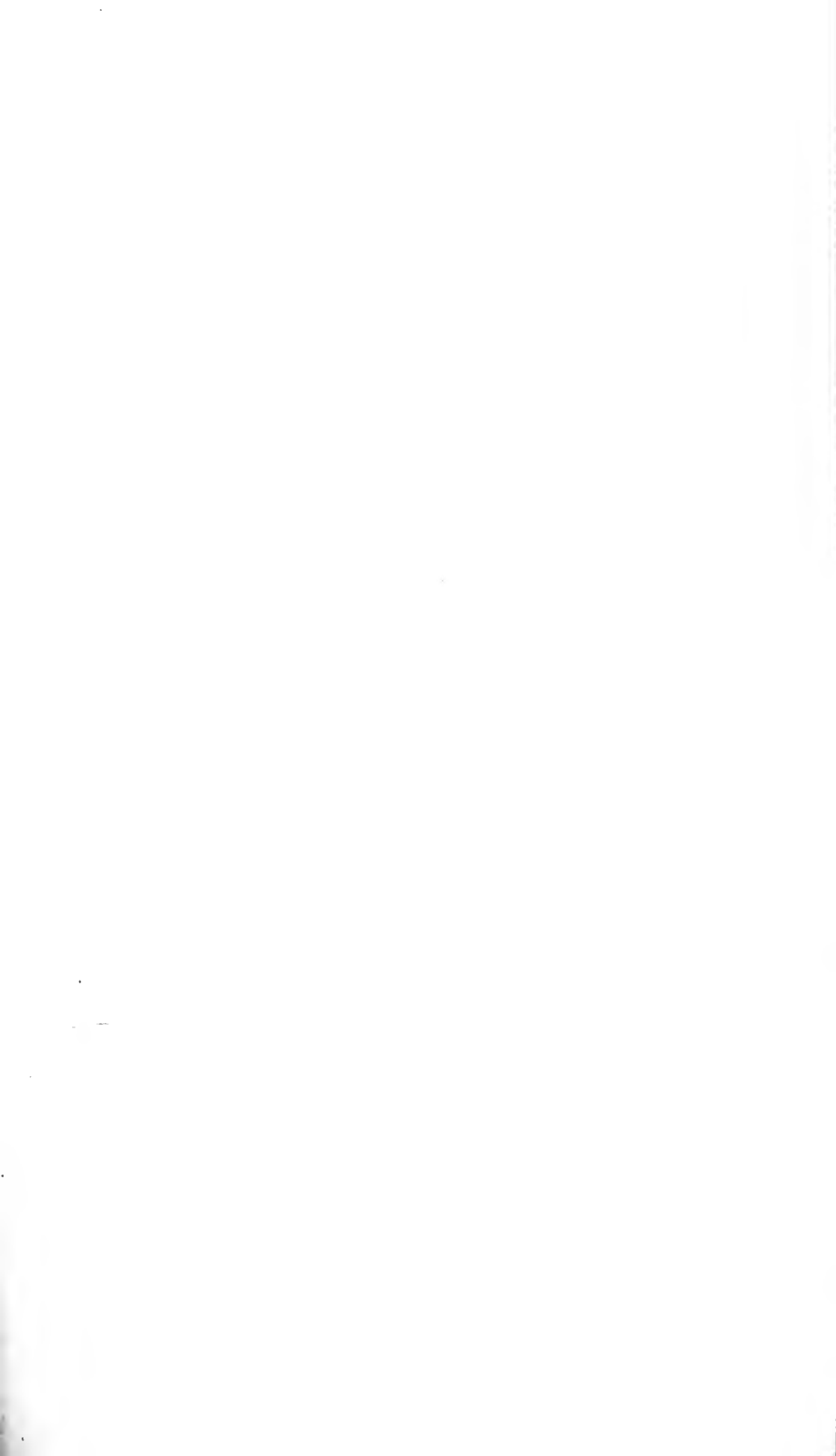
MATTER OF

WITNESS BORRIS

Key: A—Commenced. B—Upgraded. C—Reduced. D—Discharged. E—Resigned.

G—Returned. H—Reinstated. J—Leave of Absence without pay.

K—Military Service. T—Transferred.





CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the Region in the matter of: Olaa Sugar Company, Ltd. and Favorito P. Banez, An Individual, Case No. 37-CA-84, ILWU Local 142 and Favorito P. Banez, An Individual, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

Alderson Reporting Company,

Official Reporters,

/s/ By Carey S. Cowart,

Field Reporter.

No. 15143

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142,
RESPONDENTS**

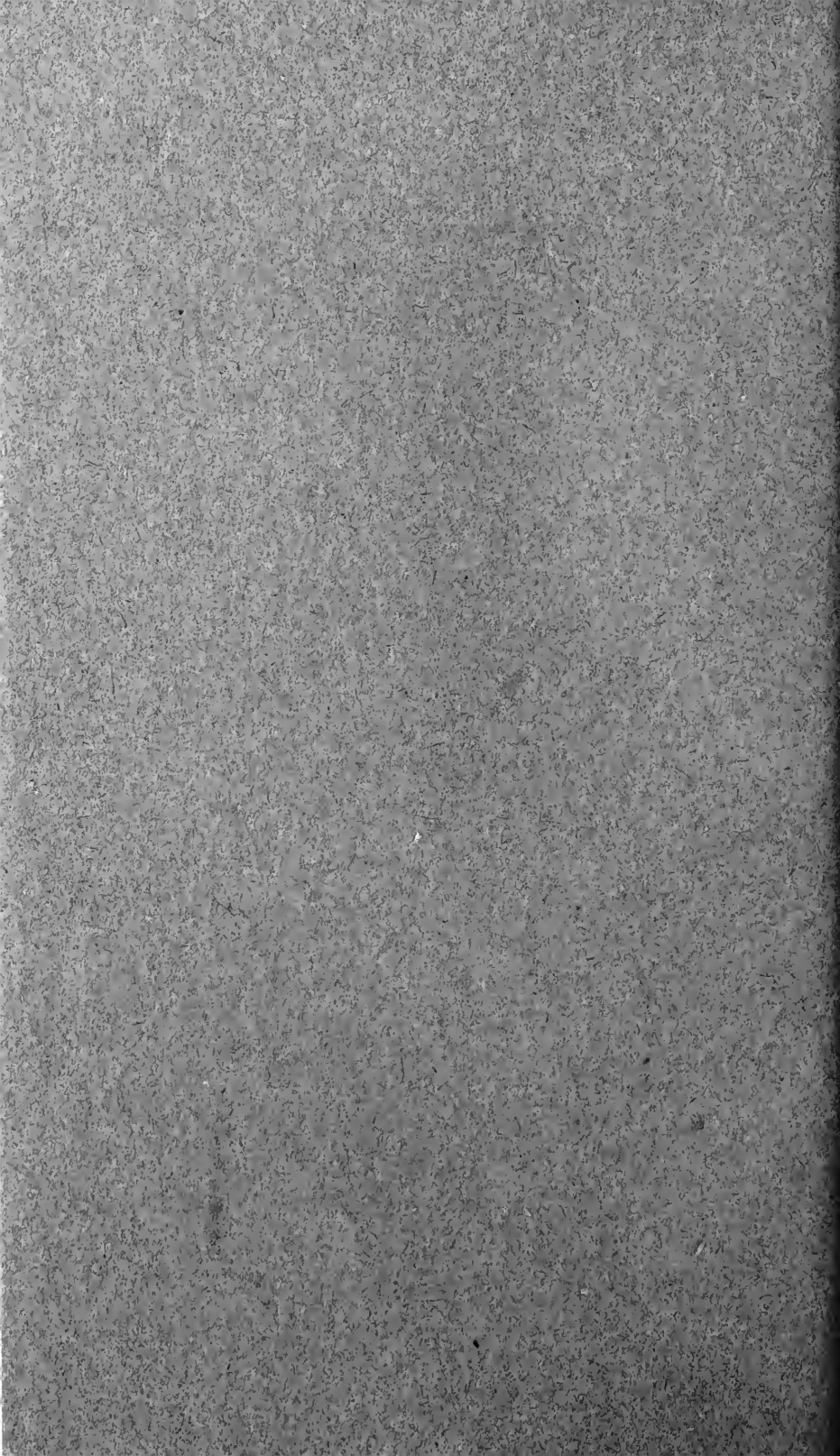
**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15143

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142,
RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondents on October 26, 1955, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.¹ This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred on the Island of Hawaii, Territory of Hawaii, within this judicial circuit. The

¹ 61 Stat. 29 U. S. C. Sec. 151, *et seq.* Relevant portions of the Act appear in Appendix A, *infra*, pp. 35-39.

Board's Decision and Order (R. 77-99) ² are reported at 114 NLRB 670.

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Introduction

The two respondents—Olaa Sugar Company, Ltd., herein called Olaa or the Company, and ILWU Local 142, herein called the Union—had a collective bargaining agreement, one clause of which provided that the Union could cause the Company to discharge employees who were not members of the Union for “disrupting harmonious working relations.” The contract contained no similar provision with respect to union members. The Board held that by entering into this agreement, and by causing the discharge of, and discharging, employee Banez pursuant thereto, the Union violated Section 8 (b) (2) and (1) (A) of the Act and the Company violated Section 8 (a) (3) and (1). In so holding the Board rejected the contention of both respondents that Banez was an agricultural laborer not protected by the Act. The facts upon which these findings rest are summarized below.

A. The Company's operations

1. The nature of the Company's business and the location of its properties

Olaa, the sixth largest producer of raw sugar and molasses in the Territory of Hawaii, is engaged in

² References to the printed record are designated “R”. In a series of references, those preceding the semicolon are to the Board's findings while those following it are to the supporting evidence.

growing cane and processing it into raw sugar and molasses (R. 24, 30; 11, 144). The mill or factory at which the cane is processed is located near Olaa Village and is separate and distinct from the growing fields (R. 27; 140, 141). Olaa annually produces raw sugar and related products valued in excess of six million dollars, most of which is shipped to the mainland (R. 30; 116, 133).

Approximately half of the cane processed at the mill is purchased from 438 independent growers, the remainder being grown by Olaa in its own fields (R. 24, 27; 173). The independent growers cultivate 6,911 acres which are intermingled among the 7,418 acres cultivated by the Company (R. 24, 27; 116, 132, 149). These fields, covering over 14,000 acres are divided into seven scattered sections which are connected by a network of two-way, paved, public highways (R. 29-30; 162-163, Empl. Exh. 2A).³

The largest section, Olaa-Mt. View, is approximately 14 miles long and 2 to 3 miles wide (Empl. Exh. 2A, 180). The mill, which has an appraised value of six to seven million dollars, and which employs 170 workmen, is located in the northeastern portion of this section on or near a public highway which runs through the section from east to west (R. 30; 141-143, Empl. Exh. 2A). A second section, Pohoa, lies 12 to 14 miles south of Olaa and is 5 to 6 miles long and 1 to 2 miles wide (R. 30; 141, 180, 185, Empl. Exh. 2A). It is connected with Olaa by a north-south public highway and by a more roundabout private road which follows an abandoned railroad bed (Empl. Exh. 2A, 131, 138).

³ Copies of this Exhibit, which is a map of the Company premises (R. 130) will be handed to the Court at the oral argument.

Both roads also lead to a third section, Kapoho, several miles to the southeast of Pohoia (Empl. Exh. 2A). The remaining four sections lie slightly farther south and west and are also serviced by both roads (Empl. Exh. 2A). The most remote of the latter sections, Kamaila, is 23 miles from the mill (R. 30; 141, 152).

In each section, private, one-way unpaved roads, totaling approximately 450 miles for the seven sections, branch off the public highways and cut through the fields (R. 29; 137-138). It is over this network of private and public roads, including a long public highway not contiguous to any cane fields, that the cane is transported to the mill.

2. The transportation of the cane to the mill

The contracts between the independent growers and the Company place the responsibility of planting, cultivating and cutting the cane on the growers who are also obligated to deliver the cane in piles of specified size to points within 300 feet of a private road (R. 24-27; 302-306). When this is done, the grower has fulfilled his contract; it is the Company's obligation to transport the cane to the mill (R. 26-27; 149). The Company also transports the cane grown on its own property to the mill.

Accordingly, the Company maintains a transportation section at its mill (R. 81, 31; 139, 175). In 1953 it had 19 truck-trailer combinations, each 64 feet in length and capable of hauling a load of 24 tons of cane (R. 31-32; 171-172, 175-177). Since hauling continues around the clock,⁴ the Company employs 33 senior

⁴ According to harvesting superintendent Mair, a witness for the Company, cane may lie along the roadside "as much as 48 hours" before being loaded (R. 157).

cane truck drivers under the supervision of a truck dispatcher who has his office at the mill, the central point of all trucking operations (R. 32-33; 159-160, 165-166). The dispatcher assigns the drivers to the various runs, instructs them what routes to take, and records the time when they leave the mill (R. 32-33; 160-161, 165-166). By means of radio-telephone, the loading foremen in the fields report the time of the trucks' arrival at the fields, the time at which loading begins, and the time when they leave for the mill (R. 32-33, 165-167). All loading is done on private roads, the piles of cane being lifted onto the trucks by a traveling crane (R. 33; 137-138; 157-158). During the loading operation, the drivers have no duties except to stay with the trucks, move them as required, and chop off any stalks of cane protruding from the vehicles that might create a hazard on the highway (R. 80, 33; 195-196). They have no duties during the unloading operation at the mill other than to maneuver the trucks into position (R. 195-196). During the few weeks between seasons, they work either in the mill or in the garage helping to repair the trucks (R. 52; 186-187).

The drivers spend approximately half their time in driving, and the remaining half is divided between loading in the fields (38 percent of their total time) and unloading at the mill (the remaining 12 percent) (R. 310). Of the driving time, approximately 60 percent is on public highways, as it is the Company's general policy to route the trucks over such roads to the fullest extent possible (R. 80; 190-191, 165). As already noted, *supra*, p. 4, some of the fields are as much as 23 miles from the mill and a considerable portion of the highways used are not contiguous to the

cane fields. Approximately half of the cane hauled by the drivers is grown by independent growers (R. 81; 182-183).⁵

The drivers operate only cane trucks (R. 34; 169). Vacancies are posted and are filled by the Company on the basis of ability, with due consideration being given to seniority and other relevant factors (R. 34; 169). The drivers' job description sets forth in detail the abilities required and the duties to be performed; all relate to the proper maintenance and safe operation of the trucks (R. 34; 154, 307-310). Their hourly wage rate is \$1.28 as compared to \$1.10½ base pay plus incentive bonus paid cane field employees (R. 198). There is no suggestion in the record that there is any interchange between the two groups.

On the basis of the foregoing facts the Board found that the Company's trucking operation is "carried on as an incident to or in conjunction with its plant operations rather than its farming operations" and held, Member Rodgers dissenting, that the senior cane truck drivers, who haul cane grown by independent contractors as well as that grown by their employer, are not exempt from the Act as agricultural laborers (R. 81, 84-85, 93-95).

⁵ The following table shows the approximate amount of time spent by Olaa's drivers in their various activities (R. 310):

I. Driving time—50%		
Time on public highways		30%
Time driving through Olaa's fields		10%
Time driving through independent fields		10%
II. Non-driving time—50%		
Time unloading at mill		12%
Time loading in fields	38%	
Time loading at Olaa fields		19%
Time loading at independent fields		19%

B. The unfair labor practices

1. *The illegal contract provision*

At all times material herein, respondents were parties to a collective bargaining agreement, Section 1, paragraph 8 of which provided that (R. 35; 297-298):

Any claim by the Union that action on the job of a nonunion employee covered by this agreement is disrupting harmonious working relations may be taken up as a grievance. Repeated disruption of harmonious working relations shall be grounds for discipline or discharge.

The contract contained no comparable provision for similar conduct by an employee who was a union member.

2. *The discrimination against Banez*

Favorito P. Banez was first employed by the Company in February 1946 as a cane cutter and continued in its employ until December 17, 1953 (R. 35, 42, 119). At the time of his discharge, he was a senior cane truck driver, driving one of the large trucks which hauled cane from the fields to the mill (*ibid.*). Banez joined the Union in 1946 but paid no dues after 1951 and was not a member in the fall of 1953 when the events here in issue occurred (R. 36-37; 124, 129-130, 213, 226-227, 287). Since the collective bargaining contract contained no union security clause, Banez was not required to join or remain a member of the Union in order to retain his employment.

Up to and including 1953, the cane was cut by hand, but the Company had been planning for some time to mechanize the field operations (R. 37; 137). The

change-over would reduce the number of employees from 1100 to 540 and the first step was scheduled for December 1953 (R. 37; 235). Approximately 75% of the reduction would be in the field force made up largely of Filipino employees (R. 37; 235, 251-252). The Company was apprehensive that the reduction would give rise to labor trouble, particularly among the Filipinos, and desiring to effect the change with as little friction as possible, discussed the situation with the Union (R. 37; 254, 263-264). It was agreed between them that the reduction would be based on seniority and ability to do the work, with consideration being given to "hardship cases" such as employees with large families (R. 37-38; 264-265).

In August, the Union learned that three employees, Banez, Dela, and Revera, were circulating a petition for the purpose of calling a general membership meeting to clear up some misunderstanding between the rank and file members of the Union and the officers thereof (R. 38; 203-206). After having investigated the matter, the Union's executive board requested a meeting with Company officials (R. 38; 120-121, 208).

At the meeting on October 19, the Union spokesmen informed the Company that Banez, Dela, and Revera were circulating a petition, that a copy was not available, but that the petition was critical of the Union's officers (R. 39; 209-211, 213-214, 224). The Union also asserted that Banez had accused the officers of having favored employees of Japanese extraction in working out the arrangements for the layoff and in job opportunities generally, to the detriment of the Filipino employees (R. 39; 225). The Union also described various incidents of alleged improper conduct by Banez, including delinquencies in his work and deroga-

tory remarks about the Union's officers (R. 39-40; 224-225). The Union claimed that Banez' criticism of the Union's officers had created racial antagonism between the officers and members of Japanese extraction on the one hand and the Filipino employees on the other with the result that the latter wanted to strike in protest against the layoff procedure (R. 40; 210-212, 232-234).

The Union informed the Company that Banez was not a member of the Union and that it was presenting a grievance with respect to him under Section 1 of the contract (R. 40; 124-125, 226-227). The Union's position was that Banez' conduct had "disrupted harmonious working relations," and it demanded that the Company take action against him pursuant to that section (R. 40; 209-212, 218-220). In effect, as Union Vice-President LaTore admitted at the hearing, the Union could not fire Banez itself and was asking the Company to do so (R. 41; 214-215). As Dela and Revera were Union members, the Union expressed the belief that it could "take care of" them (R. 40; 234). The Company in turn stated that its "relations with the Union had been satisfactory," that it "hoped they would continue that way"; that action which tended to stir up racial antagonism was a very serious problem and that such conduct "by any employee" could not be tolerated (R. 40; 227-228). The Union also discussed the Banez matter with the Company on several occasions thereafter (R. 269-271). Banez was not notified of the Union's charge and request and was given no opportunity to defend himself (R. 32-43; 242). On December 17, 1953, without prior warning, the Company wrote Banez that his employment was terminated

as of that date (R. 42; 301). The letter then went on to explain (*ibid.*):

This action is taken as a result of your actions in violation of Section 1 (Recognition and Union Security) of the agreement between Olaa Sugar Co., Ltd., and the United Sugar Workers, ILWU, Local 142, as brought to our attention by the Union.

On December 23, Banez asked Assistant Manager West why he had been discharged (R. 43; 294). West told Banez that the Union had brought up a grievance with respect to his conduct, and that a meeting was held at which it was "brought out" that Banez "was disrupting harmonious relationship with the Company by circulating a petition against the officers of the Union, and was fostering racial discontent among the Filipinos, claiming the Japanese were getting all the breaks in [the] layoff procedure . . ." (R. 43-44; 294-295).

West also told Banez that his work record was very poor, whereupon Banez reviewed his long disagreement with the Union over various issues, such as the union shop, and claimed that the "union officers were out to get him and had brought this action against him for that reason" (R. 44; 264). West replied that the Company was not interested in the internal affairs of the Union but was disturbed by the charge that Banez had stirred up racial discontent (R. 44; 294-295). When Banez asked what steps he could take with respect to his discharge, West informed him that the grievance procedure was open to him but pointed out that it would cost him a considerable sum if he carried the matter through to arbitration (R. 44-45; 295). West also reminded Banez that even if he was success-

ful in regaining his employment, he would still have to "live with the people on the plantation" and advised him that he would probably be happier if he did not spend his money and "maybe attempted to find employment elsewhere" (R. 43-45; 295). Banez, however, assured West that he "wanted to stay and fight the union" which he charged was "communist led" and was "out to get him" (R. 45; 296).

On January 7, 1954, the Company again wrote Banez that the "reason" for his discharge was "violation of Section 1 . . . of the agreement" between the Company and Union "as brought to [the Company's] attention by the Union" (R. 42; 301-302). In conclusion the letter stated: "The details of this violation, as presented to us by the Union, were explained to you at the time of your meeting with assistant manager West on December 23, 1953" (*ibid.*).

Union members Dela and Revera, who had engaged in conduct similar to Banez', were not discharged (R. 47; 243).

3. *The Board's conclusions*

Upon the foregoing facts, the Board concluded that Olaa violated Section 8 (a) (3) and (1) of the Act by entering into an agreement with the Union vesting in the latter the power to bring about the discharge of nonmembers, but not of members, for repeated disruption of working relations, and by discharging nonmember Banez at the Union's request while failing to discharge two union members who had engaged in similar conduct (R. 85-86, 52). The Board also concluded that the Union violated Section 8 (b) (2) and (1) (A) by executing the illegal contract and by causing the Company to discharge Banez (R. 78, n. 2).

II. The Board's Order

The Board's order requires Olaa and the Union to cease and desist from performing or giving effect to the illegal provision of the contract and from in any other manner violating Sections 8 (a) (1) and (3) and 8 (b) (2) and (1) (A), respectively (R. 89-90, 91-92).

Affirmatively, the order requires the Union to notify the Company in writing that it withdraws its objection to Banez' employment and requests the Company to offer him reinstatement. The order further requires the Company to reinstate Banez and jointly and severally with the Union to make him whole for any loss of pay he may have suffered by reason of the discrimination against him. Finally, the order requires both respondents to post appropriate notices (*ibid.*)

SUMMARY OF ARGUMENT

I. The contract, applicable to nonagricultural as well as agricultural employees, unlawfully discriminated in favor of Union members by giving the Union the right to demand the discharge of nonmembers under certain circumstances while containing no comparable provision as to members. The execution of a contract containing such a discriminatory provision violated Section 8 (a) (3), 8 (a) (1), 8 (b) (2), and 8 (b) (1) (A). The fact that the Company could discharge Union members for the same conduct is not sufficient to negate the discriminatory and coercive nature of the provision because the Company is not required to do so and the Union can exert no pressure upon it in the case of Union members.

II. Substantial evidence on the record considered as a whole supports the Board's finding that the Company discriminatorily discharged Employee Banez in viola-

tion of Section 8 (a) (3) and (1) of the Act and that the Union unlawfully caused the Company to engage in such conduct in violation of Section 8 (b) (2) and (1) (A). The fact that two Union members who engaged in similar conduct were not discharged demonstrates that the Union's request that the Company discharge Banez and the Company's compliance therewith were not motivated by the alleged disruptive nature of Banez' conduct but by the fact that he was not a member of the Union.

III. Banez was not exempt as an agricultural laborer. His work in transporting sugar cane from the fields to the mill was not "harvesting" but was "incidental to" harvesting; consequently it was exempt only if "performed by a farmer or on a farm." Since much of the transportation took place over public highways, it was not "performed . . . on a farm." Moreover, since the Company obtained nearly half its cane from independent growers, the transportation of such cane was not "performed by a farmer." Even with respect to Company-grown cane, the transportation was incidental to the milling rather than the farming operation. The *Waiialua* case, 349 U.S. 254, is distinguishable in that the employer there processed only his own cane, and the transportation from field to mill was exclusively over the employer's own land. The instant case is similar to *Calaf v. Gonzalez*, 127 F. 2d 934 (C.A. 1), distinguished in *Waiialua*, and to *Chapman v. Durkin*, 214 F. 2d 360 (C.A. 5), certiorari denied, 348 U.S. 897.

ARGUMENT

As stated above, the Board found that respondents violated the Act by entering into a contract which dis-

criminated against nonmembers of the Union, and by applying the discriminatory feature of the contract against truck driver Banez. Respondents' primary ground of defense appears to be that Banez was an agricultural laborer. This defense, however, even if it should be sustained, would not affect the validity of the Board's order with respect to the illegal contract, for the contract applied not only to truck drivers but also to the production employees at the mill. Accordingly in this brief we discuss, first, whether the contract was invalid, and second, whether Banez' discharge was unlawful. The issue as to the agricultural exemption is relevant only to the second question and hence is discussed in connection therewith.

I

The Board Properly Found that by Entering into a Contract Vesting in the Union the Power to Cause the Discharge of Nonunion Employees the Company Violated Section 8 (a) (3) and (1) of the Act, and the Union Violated Section 8 (b) (2) and (1) (A)

The contract in the instant case granted the Union the right to file a grievance alleging that a *nonunion* employee was "disrupting harmonious working relations" and requiring the Company to discipline or discharge him in case of "repeated disruption," but created no corresponding right or obligation with respect to *Union members* guilty of the same conduct. Under settled law, the mere execution of such a contract, even absent proof of discriminatory practices thereunder, would tend to encourage union membership and hence would violate Section 8 (a) (3) and (1), and 8 (b) (2) and (1) (A) of the Act. *Katz v. N.L.R.B.*, 196 F. 2d 411, 415 (C.A. 9); *Red Star Ex-*

press Lines v. N.L.R.B., 196 F. 2d 78, 81 (C.A. 2); *Eichleay Corp. v. N.L.R.B.*, 206 F. 2d 799, 803 (C.A. 3); *N.L.R.B. v. F. H. McGraw & Co.*, 206 F. 2d 635, 641 (C.A. 6); cf. *N.L.R.B. v. International Brotherhood of Teamsters, etc., Local No. 41*, 225 F. 2d 343 (C.A. 8).

The illegality of a clause which on its face discriminates against nonunion employees is self-evident. By vesting in the Union the power to bring about the discipline or discharge of nonmembers while giving it no power to do so in the cases of employees who are members of the Union, the clause has the "natural consequence"⁶ of encouraging employees to join or remain members of the Union. Accordingly, the mere fact that the clause exists, even absent proof of its unlawful application, violates the Act.

Before the Board, the Company denied that the clause was illegal *per se*, pointing to the fact that the Company could, on its own initiative, discipline or discharge Union members for similar conduct. The short answer to this contention is that in such cases, unlike those involving nonunion employees, the Company is not required by contract to take disciplinary action. Moreover, even if it is assumed that the disruption of harmonious working relations might be a valid ground for discharge if unrelated to Union membership or activity, the fact remains that the Union is authorized to demand that the Company act, and the latter is required to act, in the case of nonunion employees but not in the case of Union members. It follows, therefore, that the Union membership or nonmembership of an employee might well be, as indeed it was in this

⁶ *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 45.

case, the controlling factor in determining whether an employee will be discharged or not.

Equally without merit is the Company's further contention before the Board that the clause is not illegal because it does not *require* that the Company discipline or discharge a nonunion employee but only obligates it to entertain a grievance in such cases. As the Board pointed out, however, the contract provides that "repeated disruption of harmonious working relations *shall be* grounds for discharge or discipline" (emphasis supplied), thus making it mandatory that the Company take action upon the presentation by the Union of a grievance based upon "repeated disruption of harmonious working conditions" (R. 88). Even if this language is construed as permitting the Company to exercise its discretion, the mere fact that the Union is given the right to request and urge the discipline or discharge of nonmembers only discriminates against nonmembers by rendering their tenure of employment less secure than that of Union members, and hence encourages employees to join or remain members of the Union. It follows therefore that the Board properly found that the contract provision is "discriminatory per se" (R. 86), and that in executing it the Company and the Union violated Section 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act, precisely as in the cases cited *supra*, pp. 14-15.

II

The Board Properly Found that the Company Discriminatorily Discharged Employee Banez in Violation of Section 8 (a) (3) and (1) of the Act, and that the Union Unlawfully Caused the Company to Engage in Such Conduct in Violation of Section 8 (b) (2) and (1) (A)

A. Banez was discharged pursuant to the illegal contract

The evidence summarized at pp. 7-11, *supra*, establishes that the Union, acting under the foregoing discriminatory provision of the contract, requested the Company to discipline or discharge nonmember Banez and that, as a result, the Company discharged him for the stated reason that he had violated Section 1 of the contract "as brought to [its] attention by the Union." The Union's demand was based upon a claim that Banez had circulated a petition requesting a general Union membership meeting, and had criticized the Union's officials, charging that they had favored the employees of Japanese extraction and had discriminated against the Filipino employees in working out the lay-off procedure. The Union did not request the Company to discipline or discharge Union members Dela and Revera, and the Company did not do so, although both the Union and the Company knew that these two employees had engaged in conduct similar to that of Banez.

On these facts the Board found that Banez was discharged pursuant to the discriminatory provision of the contract, that Banez would not have been discharged but for his want of Union membership, and that the Union in causing, and the Company in effectuating, the discharge, therefore violated Section

8 (b) (2) and (1) (A) and 8 (a) (3) and (1) of the Act. Respondents contend, however, that notwithstanding the above circumstances Banez was discharged, not for want of Union membership, but for activities unprotected by the Act. We turn to these contentions.

In its brief to the Board, the Company admitted that Banez' "anti-union activity . . . brought the matter to a head by virtue of the complaint registered by the Union." It argued, however, that its discharge of Banez was unrelated to his anti-union activity or the Union's request of October 19, asserting instead that its basic reason was that Banez' charges created racial friction which jeopardized the Company's operations (Br. 19-20). We submit that the record warranted the Board's rejection of this contention.

Although the Company had known since summer that the Filipino employees were disturbed by the lay-off procedure, it made no effort to explain to them the problems involved or to assure them that the layoffs were being handled in a nondiscriminatory manner (R. 265). The Company had also admittedly known of Banez' activity for several months prior to the Union's request, and though the Company claims to have been disturbed thereby (R. 240-241, 246-247, 249, 251-252), it obviously did not consider the problem to be critical, for it had never discussed the matter with Banez nor had it reprimanded him for his conduct (R. 242). In short, the Board could fairly infer that, prior to the Union's request that Banez be disciplined or discharged pursuant to Section 1 of the contract, the Company had no thought of taking punitive action against him.

Moreover, if the motivating factor in the Company's decision had been the alleged disruptive effect of Banez' criticism of the lay-off procedure and not the Union's request, the Company would surely have also dis-

charged on its own initiative, as it asserts it had the right to do, the two Union members who had engaged in similar conduct. It is also significant that the Company twice stated that its reason for discharging Banez was his violation of Section 1 of the contract, "as brought to [its] attention by the Union" and on the second occasion referred to the "details" of the violation "as those" presented "to the Company by the Union," one of which, of course, was his nonmembership in the Union, *supra*, pp. 9-11. In addition, if the Company's real reason had been, as it claims, its fear that Banez' conduct might result in a strike by the field force before harvesting was complete, presumably it would have discharged him in July or August when it first learned of his activity instead of waiting until the close of the cutting season when the danger was past.⁷

Finally, even after the Union's request, the Company did not discuss the matter with Banez. Thus, he was given no opportunity to refute the Union's charges nor was he warned that he would be discharged if he continued to engage in conduct which, in the Company's opinion, stirred up racial friction. Instead, he was summarily discharged while the two Union employees who engaged in similar conduct were retained.

From the foregoing facts, we believe it is clear that, but for the Union's request, a necessary element of

⁷ As demonstrated *infra* pp. 22-23, Banez was not seeking to cause the Filipino employees to strike but was merely trying to secure a general membership meeting of the Union in order to "clear up" the misunderstanding between the rank and file members and the officers, a clearly protected activity. In any event, as the Board pointed out (R. 89), "economic pressures on an employer are no defense to what is otherwise a discriminatory discharge." *N.L.R.B. v. McCatron*, 216 F. 2d 212, 215 (C.A. 9), certiorari denied, 348 U.S. 943; cf. *N.L.R.B. v. Lloyd A. Fry Roofing Co.*, 193 F. 2d 324, 327 (C.A. 9), and cases cited at n. 5 therein.

which was Banez' nonmembership in the Union, Banez would not have been discharged notwithstanding the nature of his conduct.⁸ As the Company admitted, it needed the Union's cooperation in making the change to a mechanized field operation and was anxious that its relations with the Union continue to be satisfactory (R. 227, 240). Accordingly, when the Union persisted in pressing for Banez' discharge, the Company did not resist but discharged him pursuant thereto and for no other reason.⁹ It follows, therefore, that the Board

⁸ It having thus been demonstrated that the Company discharged Banez only because the Union requested it to do so, and not because of the nature of his activity, none of the cases cited by the Union and the Company in their briefs to the Board is applicable. In those cases the employer's sole motive for the discharge was a genuine desire to maintain order and not the fact that the employee's conduct constituted or was related to union activity. Thus in *N.L.R.B. v. Edinburg Citrus Assoc'n*, 174 F. 2d 353, 355 (C.A. 5), the court noted that the Company would probably have similarly discharged the employees if the situation had been reversed and they had been opposed to the Union, while in the instant case the employer did not discharge the two Union members guilty of the same conduct as Banez.

⁹ Before the Board the Company conceded that Banez' alleged poor work record was not the motivating cause for his discharge but was at most only a factor that was considered in determining whether the disciplinary action to be taken under the contract provision should be a discharge. Moreover, the record considered as a whole supports the Board's finding that the Company's claim that Banez' work record played a part in its decision was but a "pretext, belatedly thought of, and seized upon, by the Company in an effort to exculpate itself" for on two occasions the Company wrote Banez that he was discharged because of his "violation of Section 1 . . . of the agreement" (R. 86, n. 10, 45-46; 301-302). Moreover, although in the remote past Banez had twice been demoted, he had been upgraded on 10 occasions, the most recent being in August of the previous year when he was promoted to senior cane truck driver (R. 45-46; 317). Finally, no new complaint had been registered against Banez for several months prior to his discharge, and he had been disciplined for each of his earlier offenses at the time when it occurred (R. 46-47; 313-316).

properly found that in discharging Banez, the Company discriminated against him for exercising the right guaranteed him by Section 7 of the Act to refrain from joining a union, absent a valid union security clause, and that this discrimination necessarily encouraged employees to join or remain members of the Union. See *Radio Officers Union v. N. L. R. B.*, 347 U. S. 17, 45, 51-52. Consequently, the Company by enforcing the discriminatory provision of the contract violated Section 8 (a) (3) and (1) of the Act and the Union, by causing the Company thus to discriminate, violated Section 8 (b) (2) and (1) (A).

Equally without merit is the Union's claim that its request was based solely on its desire to eliminate racial friction and was in no way motivated by Banez' non-membership or by his criticism of the Union's officials. Although Banez joined the Union shortly after he was employed, he paid no dues after 1951 and had long been critical of it, opposing particularly its efforts to obtain a union shop clause in the collective bargaining agreement (R. 287-289). That the Union was in turn antagonistic to Banez and that it was this antagonism rather than concern over racial friction that caused the Union to request his discharge is disclosed by Union Vice Chairman LaTore's account of his investigation when the Union learned that Banez, Dela, and Revera were circulating a petition designed to obtain a general membership meeting at which they could air their complaints. As LaTore expressed it, "I started to check up . . . and compiled all the reports regards . . . this petition circulation, and most particularly how Banez happened to be in the picture. It looks like that ever since Banez had made up his mind to quit from the Union

that he seems to be a mind out of place . . . in any department that he was working with . . .” (R. 206-207). In LaTore’s words, he told the Company that “Since this . . . petition came along and Brother Banez . . . broke into the picture, that from there on I was appointed to follow up the matter . . .” (R. 216). In short, the record establishes that although Union members Dela and Revera were engaged in similar conduct, the Union’s investigation was directed primarily, if not limited entirely, to securing evidence which could be used against nonmember Banez, thus providing the most convincing proof that the Union’s action was determined by the membership or nonmembership of the employees involved rather than by the nature of the activity.

The Union’s contention that Banez was seeking to cause a strike by the Filipino employees rests solely upon a conclusionary statement by Vice Chairman LaTore, who cited no evidence to support it (R. 211).¹⁰ In fact LaTore himself testified that the purpose of the petition was to obtain a general membership meeting of the type contemplated by the contract¹¹ in order to “clear up some misunderstanding between the rank and file members of the Union and the officers. . . .” (R.

¹⁰ Although the Union argued to the Board that the Examiner improperly rejected its offers of proof with respect to the various statements made by Banez, none of these offers attributed any statement to Banez which suggested, either directly or indirectly, that the Filipino employees should strike (R. 200-202, 220-222).

¹¹ Section 16 of the contract provided that the Company would arrange for a stop-work meeting of not more than 4 hours’ duration upon written request by the Union made at least one week in advance. It further provided that there shall not be more than 3 such meetings during any contract year but that an additional meeting can be held for the purpose of ratifying a new agreement between the parties (R. 300).

204). In seeking such a meeting, Banez was exercising his right under Section 7 to engage in concerted activities and to support or refrain from supporting a labor organization. *Salt River Valley Water Users Assn. v. N.L.R.B.*, 206 F. 2d 325, 328 (C.A. 9).¹² A membership meeting at which the members could express their views and attempt to induce the Union to alter its position would seem to be an orderly method of obtaining relief and the very antithesis of strike action. While Banez' criticism of the Union clearly reflected and perhaps contributed to employee unrest, it does not follow that it was unprotected by the Act, as the Union argued before the Board, where, as here, its purpose was limited to the wholly legitimate end of obtaining a membership meeting at which the employees' grievance could be fully discussed and a decision reached by majority vote. As this Court has said, "It is obvious that concerted activities which are protected by the Act often create a disturbance in the sense that they create dissatisfaction with the status quo." *Salt River Valley, supra*, 206 F. 2d at 328-329. See also *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied, 342 U.S. 919.

Finally, the failure of both the Union and the Company to exhibit concern, or take action, with respect to Union members Dela and Revera, who engaged in con-

¹² In its capacity as the exclusive bargaining representative of the employees under Section 9 (a) of the Act, the Union was under a statutory obligation to represent equally all the employees in the unit whether they were Union members or not. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-337 and cases cited therein. Since Banez believed that the Union's officers had discriminated against the Filipino employees by agreeing to the lay-off procedure, he had a right to criticize the Union's action and urge that a meeting be held at which the Filipino employees could demand that the Union act in a nondiscriminatory manner.

duct similar to that of Banez, conclusively demonstrates that the Union's request that the Company discharge Banez and the Company's compliance therewith resulted from Banez' exercise of his right to refrain from joining the Union. As this Court has recently reiterated, even if an employee's conduct constitutes grounds for discharge, the discharge will violate the Act if in fact the employee would not have been discharged but for his union membership, or want thereof. *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450, citing *Wells, Inc. v. N.L.R.B.*, 162 F. 2d 457, 459-460 (C.A. 9).

B. Banez was not exempt as an "agricultural laborer"

1. *The statutory provisions—the "two branches" of the exemption*

Section 2 (3) of the Act provides that the term "employee" shall not include "any individual employed as an agricultural laborer." Since 1946, Congress has, by means of riders to the Board's annual appropriation, directed that the Board in determining whether employees are agricultural laborers must be governed by the definition thereof in Section 3 (f) of the Fair Labor Standards Act (R. 20, 82, n. 7)¹³ This provision reads in pertinent part:

¹³ In appropriating funds for the Board, Congress has annually provided that no part of the appropriation "shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, or orders concerning bargaining units composed of agricultural laborers as referred to in Section 2 (3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1947, and as defined in Section 3 (f) of the Act of June 25, 1938 (52 Stat. 1060)

Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil . . . the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Accordingly, the issue here is whether Banez was within the exemption provided by that Act. See *Dofflemeyer v. N.L.R.B.*, 206 F. 2d 813 (C.A. 9).¹⁴

As the Supreme Court stated with respect to this provision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 at 762-763, "this definition has two distinct branches," the first of which includes "certain specific practices such as cultivation and tillage of the soil, dairying, etc.," and the second of which includes "things other than farming" if "performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." Following this analysis, we show below that Banez' work falls within neither branch of the exemption.

2. *The "first branch"—transporting cane from field to mill is incidental to "harvesting" rather than "harvesting" itself*

With respect to the first branch of the exemption, it is evident that Banez, a truck driver, was not engaged

¹⁴ The views of the Department of Labor with respect to this issue are set forth in the correspondence reprinted as Appendix B, *infra*, pp. 39-44.

in 'the cultivation and tillage of the soil, dairying, the production, cultivation [or] growing . . . of any agricultural or horticultural commodities.' None of those expressions, we submit, would ordinarily be used to describe the work of a truck driver.¹⁵ A somewhat closer question may be presented as to whether a truck driver who drives the loaded truck to the mill but who neither loads nor unloads the vehicle is engaged in "harvesting." That term, broadly construed, might extend beyond the reaping and gathering customarily associated with harvesting, and embrace the transportation of the crop to the mill. But, even aside from the fact that the exemption is to be construed strictly rather than broadly,¹⁶ the language of the statute and authoritative construction thereof establish that the trucking operation in this case is not "harvesting."

The statute expressly indicates that transportation activities, if exempt at all, fall within the second branch of the definition—practices which are exempt if "performed by a farmer or on a farm." See *Farmers Reservoir, supra*, 337 U.S. at 766-767. Thus, the statute does not regard "delivery to storage or to market" as

¹⁵ In speaking of a related exemption from the Fair Labor Standards Act, the Supreme Court said that "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood, according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison v. Holly Hill Co.*, 322 U.S. 607, 618.

¹⁶ As this Court has stated, "It is elementary, of course, that the [Fair Labor Standards] Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exceptions, *which are subject to a strict construction.*" *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, 106, emphasis supplied, and cases there cited; *McComb v. Hunt Foods*, 167 F. 2d 905, 908; see also *Phillips Co. v. Walling*, 324 U.S. 490, 493, where the Supreme Court observed that "any exemption" from this Act "must therefore be narrowly construed."

“harvesting” but as activities “incident to or in conjunction with” harvesting. This reading is confirmed by the judicial authorities, which have held either that the transportation of crops from field to mill is not exempt at all, or that it meets the second branch of the exemption, i.e., exempt if performed by a farmer or on a farm. *Chapman v. Durkin*, 214 F. 2d 360, 363 (C.A. 5), certiorari denied, 348 U.S. 897; *Bowie v. Gonzalez*, 117 F. 2d 11, 18 (C.A. 1); *Calaf v. Gonzalez*, 127 F. 2d 934, 936-937 (C.A. 1); see also *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 261, 263, where the Court emphasized that the Company was a “farmer” and that its “transportation system [was] all either in or contiguous to its fields;” cf. *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398, 402-403, where this Court required further findings before determining the status of truck drivers who performed an operation “integrated with the harvesting” and who worked “as a field unit” with the mowers, rakers, and choppers. Since Banez’ work does not constitute “harvesting” but is only “incidental to” harvesting, we turn to “the second branch of the definition of agriculture” to determine whether Banez’ work is “performed by a farmer or on a farm.” *Farmers Reservoir*, 337 U.S. at 766.

3. The “second branch”—the transportation in this case was not “performed by a farmer or on a farm”

- a. Driving on the public highways is not work on a farm

We submit that under the facts of this case it cannot reasonably be said that Banez’ work was “performed . . . on a farm.” Approximately 60 percent of his

driving time was spent on the public highways, in addition to which he also spent time at the mill while the truck was being unloaded. Consequently, as the Fifth Circuit expressly held with respect to the truck drivers in the *Chapman* case, 214 F. 2d at 363, Banez was not employed "on a farm" within the meaning of the exemption (see notes 15 and 16, *supra*). Indeed, except in the case of a large plantation embracing both farmlands and a mill, such as was before the Court in *Waialua* (see 349 U. S. at 257, 216 F. 2d 466 at 472, n. 17, 18), transportation of a farm product to a mill normally embraces travel on the public highways. Such a movement is not "on a farm," and consequently is exempt only if "performed by a farmer." See the legislative history summarized in *Farmers Reservoir*, 337 U. S. at 767. We turn, then, to the question whether Banez' trucking was "work performed by a farmer."

- b. Olaa is not "a farmer" in handling cane grown by independents, and even the transportation of Olaa-grown cane was incidental to its milling rather than its farming operations

Olaa's activities in growing its own sugar cane are those of a farmer, but its milling operation is industrial rather than agricultural in character. As a result, its field employees are exempt as agricultural laborers but its mill employees are not. *Maneja v. Waialua Agricultural Co.*, 349 U. S. 254, 268, 270. As the *Waialua* case demonstrates, the mill employees would not be exempt even if Olaa processed only sugar grown in its own fields; the exemption is *a fortiori* inapplicable to the mill employees here, for approximately half the sugar processed in the mill comes from

the farms of independent growers. See *Bowie v. Gonzalez*, 117 F. 2d 11, 18 (C. A. 1); *Calaf v. Gonzalez*, 127 F. 2d 934, 936 (C. A. 1); *Chapman v. Durkin*, 214 F. 2d 360, 361-362 (C. A. 5), certiorari denied, 348 U. S. 897; cf. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755, 766-767, and see particularly n. 15 at 766; *North Whittier Heights Citrus Assoc. v. N. L. R. B.*, 109 F. 2d 76, 79-80 (C. A. 9), certiorari denied, 310 U. S. 632; *Idaho Potato Growers v. N. L. R. B.*, 144 F. 2d 295, 296, 301 (C. A. 9). With respect to the milling of Olaa's own cane, however, the question whether Banez was employed as an agricultural laborer when he transported that cane to the mill depends upon whether the transportation was incidental to the growing (exempt) or incidental to the milling (nonexempt). The Board found (R. 81) that "the Company's trucking operation is carried on as an incident to, or in conjunction with, its plant operations, rather than its farming operations." We submit that this finding has ample support in the record, and accords with judicial authorities.

The headquarters of the transportation system are at the mill, rather than in the fields. The truck dispatcher is located at the mill, and there supervises the work of the drivers (R. 32-33; 160-161, 165-167). Moreover, during the nondriving season, the drivers are employed in the mill or in the garage, and not in the fields (R. 52; 186-187). In this respect the instant case is similar to *Calaf v. Gonzalez*, 127 F. 2d 934, 938 (C. A. 1), where the court, noting that the headquarters of the transportation system were at the mill, held that truck drivers transporting sugar cane from the fields to the mill were not exempt, although it observed that a different result might obtain if the

“heart of the transportation system and the situs of the employment of the workers were located at the farm.” Cf. *N. L. R. B. v. Tovrea Packing Co.*, 111 F. 2d 626, 628, certiorari denied, 311 U.S. 668, where this Court held that employees in feeding pens which were “maintained as an incident to and not independent of the operation of the packing plant” were not agricultural laborers.

Further evidence that Banez’ transportation is to be viewed as incidental to Olaa’s milling, rather than its farming, operations lies in the fact that approximately half of the cane which Banez transported came not from Olaa’s farms but from the farms of independent growers. Since Olaa does not function as a “farmer” with respect to this cane, Banez’ work in trucking it to the mill is work performed by the processor, not “by a farmer,” and hence is outside the exemption. See cases cited *supra*, p. 29. But it would be highly unrealistic, we submit, to draw a distinction between Banez’ work when he is transporting cane grown by Olaa and cane grown by independent growers, and since the latter is necessarily incidental to the milling the former should be similarly viewed. Indeed, so far as the record shows, Banez may on occasion transport both Olaa-grown cane and independent-grown cane in the same truckload. Cf. *Calaf v. Gonzalez*, 127 F. 2d 934, 936 (C. A. 1); *Wabash Radio Corp. v. Walling*, 162 F. 2d 391, 394 (C. A. 6).¹⁷

¹⁷ In construing the Fair Labor Standards Act the courts have held an exemption inapplicable to an employee who does a substantial amount of non-exempt work, or whose exempt and non-exempt work is commingled. See, for example, *North Shore Corp. v. Barnett*, 143 F. 2d 172, 175 (C.A. 5); *Walling v. W. D. Haden Co.*, 153 F. 2d 196, 199 (C.A. 5), certiorari denied, 328 U.S. 866; *Mitchell v. Stinson*, 217 F. 2d 210, 217 (C.A. 1); *McComb v. Del Valle*, 80 F. Supp. 945, 951 (D. P.R.); *Shain v. Armour & Co.*, 50 F. Supp.

In short, Banez was engaged, not in "harvesting" but in work incidental thereto; he was not employed "on a farm," as he spent a substantial amount of time on the highways, and he was not employed "by a farmer" as his work was incidental to Olaa's milling operations, both with respect to the cane Olaa purchased and that which it grew. We now show that these propositions, discussed above, are not in conflict with the authorities relied on by respondents.

4. *The Waialua and Clinton cases are inapposite to the case at bar*

During the proceedings before the Board, respondents relied primarily on this Court's decision in the *Waialua* case, *supra*, which was then pending before the Supreme Court. The ultimate decision by the Supreme Court, although it held the transportation workers in that case to be engaged in agriculture, shows that *Waialua* is distinguishable from the case at bar in two significant respects. In the first place,

907, 911 (W.D. Ky., per Miller, J.); *Walling v. DeSoto Creamery Co.*, 51 F. Supp. 938, 943 (D. Minn.); *Fleming v. Swift & Co.*, 41 F. Supp. 825, 831 (N.D. Ill.), affirmed, 131 F. 2d 249 (C.A. 7); *Walling v. Peacock Corp.*, 58 F. Supp. 880, 883 (E.D. Wis., per Duffy, J.); *Jordan v. Stark Bros.*, 45 F. Supp. 769, 771-772 (W.D. Ark.), *Sykes v. Lockmann*, 156 Kan. 223, 132 P. 2d 620, 624, certiorari denied, 319 U.S. 753. See also *Roland Co. v. Walling*, 326 U.S. 657, 664; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572; *Southern California Freight Lines v. McKeown*, 148 F. 2d 890 (C.A. 9). However, the Board, in several representation cases commencing with *Clinton Foods*, 108 NLRB 85, has excluded from bargaining units employees part of whose time was spent in exempt agricultural labor, analogizing their status to employees who spent part of their time as supervisors, 108 NLRB at 89, n. 6. In the instant case, the Board found that none of Banez' work was within the exemption, and the issue before the Court is whether, on this record, Banez as a matter of law is outside the protection of the Act.

Waialua processed only sugar grown on its own farmland; it did not, as does Olaa here, purchase sugar from independent growers. Second, in the *Waialua* case, the cane in moving from the field to the mill was transported solely over Waialua's farmlands, and not as in the instant case over the public highways. In brief, then, Waialua was a farmer, and the transportation occurred on the farm, whereas Olaa—at least with respect to the cane obtained from independent growers—was not a farmer, and much of the transportation occurred off the farm. The importance of these distinctions is attested by the *Waialua* decision itself, for the Supreme Court expressly noted that the *Bowie* and *Calaf* decisions of the First Circuit, 117 F. 2d 11 and 127 F. 2d 934, were not apposite, distinguishing them on the grounds suggested above. See 349 U. S. at 262-263.

Respondents further relied on the Board's decision in *Clinton Foods, Inc.*, 108 N. L. R. B. 85. Of course, the issue before this Court is the validity of the Board's decision in *this* case on *this* record. In any event, as the Board demonstrated (R. 79-81), the *Clinton* case is clearly distinguishable.

Three types of drivers were involved in *Clinton*: (1) "Goat drivers" who hauled fruit from the groves to the roadside and who were found to be agricultural employees; (2) "Semi drivers" who drove semi-trailers from the roadside to the employer's packinghouse or processing plant and who, in accord with the wishes of the parties, were found to be industrial employees; (3) "Flat drivers" whose primary job was hauling fruit from the groves to the plant, a distance of 2 or 3 miles (*id.* at 86). The Board, emphasizing the proximity of the groves to the plant, the fact that when hauling fruit from the groves to the plant the flat drivers spend a sub-

stantial part of their time on farm property, and the fact that the operation was conducted by and for the benefit of the employer who admittedly was engaged in a farming operation, concluded "upon the basis of the present record," that the flat drivers were agricultural employees (*id.*, at 87).

Although both the Company and the Union contended before the Board that the truck drivers in the instant case are like the "flat drivers" in *Clinton*, the Board pointed out (R. 79-80) that since the drivers here haul cane from the roadside to the plant, they are more like the semi-drivers in *Clinton* who were found to be industrial employees.

Moreover, as the Board further noted, even if the cane truck drivers are considered more nearly like the flat drivers in *Clinton*, there are distinguishing factors (R. 80). Thus in *Clinton* the Board relied "particularly" on the proximity of the groves to the plant (3 miles maximum) while here some of the fields are as much as 23 miles distant and a majority are at least 10 miles distant, *supra*, p. 4. Even more important, the flat drivers in *Clinton* hauled fruit "from the groves," as distinguished from the semi-drivers who hauled fruit only "from the roadside," and the former thus spent some of their time in the actual growing area. In contrast, the cane truck drivers here perform no work in the fields, even during the 50 percent of their time when they are hauling Company grown cane; they park the trucks on the roadside (R. 80; 195-196). Finally, the drivers in *Clinton* hauled fruit grown exclusively by their employer while the drivers here spend half of their time hauling cane purchased by the Company in its capacity as a commercial processor, and the entire trucking operation, like that in the *Calaf* case, *supra*,

is thus an incident to Olaa's milling rather than its farming operation.

5. *Summary*

The truck drivers in this case are engaged not in "harvesting" but in work incidental thereto; consequently the first branch of the exemption is inapplicable. The second branch is likewise inapplicable, for their work is not performed on a farm, and they are not employed by a farmer. This case, in short, resembles *Chapman v. Durkin*, 214 F. 2d 360 (C.A. 5), certiorari denied, 348 U.S. 897, and *Calaf v. Gonzalez*, 127 F. 2d 934 (C.A. 1) rather than the *Waialua* case, 349 U.S. 254.¹⁸ It follows that the Board correctly held that Banez was not exempt and that respondents cannot escape liability for his discriminatory discharge.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order of the Board.

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OCTOBER, 1956. *National Labor Relations Board.*

¹⁸ Since the Supreme Court denied certiorari in *Chapman* only a month after it granted the writ in *Waialua*, 348 U.S. 870, 897, it would seem that the Court regarded the cases as distinguishable. And, as noted above, p. 32, the Supreme Court itself distinguished *Calaf* from *Waialua*, 349 U.S. at 262-263.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

Definitions

SEC. 2. When used in this Act—

(3) the term “employee” . . . shall not include any individual employed as an agricultural laborer . . .

* * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made . . . : Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of

subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours, of employment, or other conditions of employment.

* * * * *

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall be conclusive. * * *

2. The relevant provision of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 203 (f), is as follows:

Section 3. As used in this Act—

* * * * *

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

APPENDIX B

June 28, 1955

Mr. Stuart Rothman
Solicitor
Department of Labor
Washington, D. C.

Dear Mr. Rothman:

Because of the rider to the Board's appropriation requiring the Board to follow the definition of the term "agriculture" as defined in Section 3(f) of the Fair Labor Standards Act, the Board has before it for deci-

sion a case involving the question as to whether certain truck drivers are "agricultural laborers" as there defined. Accordingly, an interpretive opinion of the status of these truck drivers under Section 3(f) is hereby requested, particularly in the light of the recent decision by the Supreme Court in *Maneja v. Waialua Agricultural Co.*, decided May 23, 1955.

The relevant facts are as follows:

The employer of the truck drivers owns and operates both sugar cane fields and a sugar cane processing plant in Hawaii. It processes in the plant not only sugar cane grown in its own fields, but also sugar cane grown by independent growers, divided about 50-50. It has northern fields where the plant is located, and geographically separated southern fields which are about 23 miles from the plant. The fields of the independent growers are contiguous to the employer's fields. The sole function of the employer's truck drivers is to haul the cane by truck from the roadside of the employer's fields and the independent growers' fields to the plant for processing. During the loading at the roadside, the truck drivers just stand around while others do the loading. The general practice in loading this employer's cane and some of the independent growers' cane is to load on a private road of the employer, drive on such road to the public highway, and then use the public highway to the plant, with the drivers spending about 60% of their driving time on the public highways and the remaining 40% of their driving time on the employer's private roads. All of these private roads appear to be contiguous to the fields, but a considerable portion of the public highways used are not contiguous to any of the fields. In fact, a long public highway not contiguous to any of the fields must be used to transport cane from the employer's southern fields to the plant

in the northern fields. And, as already indicated 60% of the employer's transportation system is on the public highways. Also, because half of the employer's processing is for independent growers, the drivers spend about 50% of their time hauling the cane of independent growers. The drivers are considered by the employer to be part of its "harvesting" department, but they work out of, and are supervised from the processing plant.

In view of these facts, the Board would like an opinion as to whether these truck drivers are "agricultural" or non-agricultural, in the light of the *Waiialua* decision on the railroad workers involved there.

Because this inquiry involves a pending case, we would appreciate an early reply.

Sincerely,

WILLIAM R. CONSEDINE,
Acting Solicitor.

U. S. DEPARTMENT OF LABOR

July 13, 1955

Dear Mr. Consedine:

I have your letter of June 28, 1955 asking for an opinion on the status of certain truck drivers under section 3(f) of the Fair Labor Standards Act, particularly in the light of the recent Supreme Court decision in *Maneja v. Waiialua Agricultural Company*. You submit the following relevant facts in your letter:

(Letter of June 28 quoted)

It is my opinion that the truck drivers are not employed in "agriculture" within the meaning of Section 3(f) of the Act. Though *Waiialua* is not in point since it deals with employees of a single grower-processor, the decision is helpful because of its discussion of two

decisions by the First Circuit involving sugar mills processing their own cane and cane grown by others. The first of these decisions, *Bowie v. Gonzelez*, 117 F.2d 11, held the agriculture exemption to be inapplicable to the processing employees of such a mill. Thus, as the Supreme Court expressly recognized in *Waialua*, though transportation employees were not involved in *Bowie*, the decision made it clear that the exemption would not apply to them if they hauled cane grown by independent growers.

In its second decision, *Calaf v. Gonzalez*, 127 F. 2d 934, the First Circuit expressly held the exemption to be inapplicable to transportation employees hauling both cane grown by their employer and cane grown by others. It also pointed out that even where the cane being transported is grown exclusively by the employer, the exemption would not apply unless "the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm" (127 F. 2d at 937-938).

In its discussion of *Bowie* and *Calaf*, the Supreme Court did not criticize either case, but, on the contrary, recognized that both were distinguishable from *Waialua*. Neither, said the Court, was "apposite." And, in allowing the exemption for *Waialua*'s railroad employees, the Court expressly rested its decision on its findings that "Waialua's transportation is all either in or contiguous to its fields * * *," and that the "railroad is used *exclusively* for the effectuation of the agricultural function of transporting exempt agricultural workers to the fields, together with their equipment and supplies, and hauling freshly cut cane to the processing plant" (emphasis added). See also *Farmers Irrigation Co. v. McComb*, 337 U.S. 755, where the Supreme Court noted that one requirement for exemption is that the practices be incidental to 'such' farming" (Id., 766, n. 15). "Thus," said the Court, "processing on a farm

of commodities produced by *other* farmers is incidental to or in conjunction with the farming operation of the *other* farmers and *not* incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture," citing with approval *Bowie v. Gonzalez*, 117 F. 2d 11 (Id., 766-767; emphasis added).

Very truly yours,

STUART ROTHMAN,
Solicitor of Labor.

U. S. DEPARTMENT OF LABOR

July 19, 1955

Dear Mr. Consedine:

I would like to clarify some statements in my letter of July 13, 1955 concerning the *Bowie* and *Calaf* cases.

Contrary to what was said in that letter, the *Bowie* case did involve transportation employees, specifically holding such employees hauling cane to the mill grown by independent growers to be non-exempt. In *Waialua*, the Supreme Court recognized that the *Bowie* case had so ruled. In the *Calaf* case, the First Circuit, after recognizing that it had already disposed of the question involving employees transporting cane grown by independent growers in the *Bowie* case, proceeded to decide the additional question of whether employees transporting cane exclusively grown by the mill owners should also be outside the exemption. In deciding again that the exemption did not apply, the Court based its decision on facts which in its opinion showed that the transportation was incident to milling rather than to farming. As I stated in my previous letter, the Supreme Court regarded both *Bowie* and *Calaf* distinguishable from *Waialua*.

This additional information which I thought you should have does not affect my previous conclusion that the truck drivers are not employed in "agriculture."

Very truly yours,

STUART ROTHMAN,
Solicitor of Labor.

No. 15,143
IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	Petitioner,
---------------------------------	-------------

v.

OLAA SUGAR COMPANY, LIMITED,	
------------------------------	--

and

ILWU LOCAL 142,	
-----------------	--

Respondents.	
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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

**ANSWERING BRIEF FOR RESPONDENT
OLAA SUGAR COMPANY, LIMITED**

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FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK



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No. 15,143
IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	Petitioner,
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v.

OLAA SUGAR COMPANY, LIMITED,	}
------------------------------	---

and

ILWU LOCAL 142,	}
-----------------	---

Respondents.

**On Petition for Enforcement of an Order
of the National Labor Relations Board**

**ANSWERING BRIEF FOR RESPONDENT
OLAA SUGAR COMPANY, LIMITED**

PRELIMINARY STATEMENT

The petition of the National Labor Relations Board, hereinafter generally called the "Board", for enforcement of its order issued against respondents, involves two points: (1) The alleged discriminatory discharge by Olaa Sugar Company, Limited, on or about December 17, 1953, of Favorito P. Banez, a truck driver; and (2) the question as to the Board's jurisdiction in issuing its order.

In this brief Olaa Sugar Company, Limited, will not discuss the Board's decision that Banez was discriminatorily discharged. On that point Olaa relies upon the brief of the respondent, ILWU, Local 142.

The situation presented by the Board's decision that it has jurisdiction in this case is of great importance to the entire Sugar Industry in Hawaii, especially in view of the purported facts upon which the Board bases its decision and order, and of the Board's conclusions of law in connection with the facts in the case, and in this brief Olaa will discuss the question of the Board's jurisdiction.

The Board, acknowledging that its jurisdiction depends upon whether Banez, at the time of his discharge, was an agricultural laborer within the meaning of Sec. 3(f) of the Fair Labor Standards Act, ruled that he was an industrial employee connected with the mill operations of Olaa. Olaa contends that the evidence shows that Banez was an agricultural laborer.

I

STATEMENT OF FACTS

Olaa does not agree with certain portions of the statement of facts in the brief for the Board. Much less does it agree with some of the Board's findings of fact, some of which will be specifically discussed hereinafter. Inasmuch as the discussion of some of the Board's findings of fact is necessarily of some length and involves a consideration of the evidence, these are not included in Olaa's statement of facts.

On or about December 19, 1953, Favorito P. Banez, who was employed by Olaa as a senior truck driver, was discharged by Olaa, and under date of July 13, 1954, the Labor Board filed a consolidated complaint against Olaa and ILWU 142 (R. 5-10), charging that Banez was discriminatorily discharged.

During 1953 and at the time Banez was discharged Olaa was engaged in the business of growing, cultivating, harvesting and processing into raw sugar and molasses in its sugar mill sugar cane grown by it on its own lands, and also in processing in its mill, on either a cane-purchase or a toll agreement, cane grown by independent growers on lands owned or controlled by them. Olaa, by its employees, harvested the growers' cane at the growers' expense, and its employees, including Banez, hauled the cane to its mill. Olaa owned and cultivated approximately 7418 acres of its own cane, and the land under cultivation by the independent and adherent planters (hereinafter generally called "growers") amounted approximately to 6911 acres (R. 132), of which total approximately 2500 acres were leased by Olaa to the growers (R. 147).

Olaa had approximately 340 miles of its own roads, and in addition there were about 106 miles of private roads through the fields of the growers over which Olaa had the right to travel. All of the cane of both Olaa and the growers was loaded onto Olaa's trucks on these private roads. None was loaded on a public highway (R. 136-138). Olaa had three distinct operating departments—a field department, a milling department, and a third, consisting of assorted services (R. 139).

The field department included the harvesting department (R. 139). The transportation section of Olaa's operations was under the harvesting superintendent, George Mair (R. 153), who was in charge of all the truck drivers and their operations (R. 155, 160). The truck dispatcher, the immediate supervisor of the truck drivers, was under the supervision of the harvesting superintendent (R. 155, 160, 169).

The plantation fields are divided into three sections (R. 155)—the Mountain View Section, the Olaa Section, and the Puna Section. The Olaa and Mountain View Sections are adjoining. The Puna Section consists of seven noncontiguous areas called respectively the Pahoa, Kamaili, Kaueleau, Kauaea, Malama, Pohoiki and Kapoho areas (Empl. Exh. 2A). This exhibit, a map, is not in the record filed with this Court. Counsel for the Board states that it will be handed to the Court at the oral argument (Br. 3). It is necessary for an understanding of the facts.

The exhibit shows the public roads and the plantation railroad system. The railroad system is shown by hatched lines. The railroad operations were discontinued several years ago. The exhibit does not show any private roads. A large portion of the railroad bed was in 1953 used as a road over which the cane trucks passed to and from the mill (R. 131, 138, 163-164). The public roads go through large areas of Olaa's cane lands (R. 153).

Because of the nature of the land, due to lava flows, Olaa's cane lands in the Puna Section are separated by large areas of waste—uncultivable land—and while

the cane areas are as contiguous as possible (R. 132), the result is that the distance of the longest haul from the fields in the Puna Section to the mill is long—about 23 miles from the farthest fields to the mill. The longest haul in the Olaa-Mountain View area is around 14 miles (R. 140-141).

The mill is located in the Olaa Section and is surrounded by Olaa's cane fields (R. 140). The mill proper is one building (R. 141). The entire mill operations were under the control of the factory superintendent (R. 139). The mill had approximately 170 employees who were employed "strictly in the factory or milling operations and the service operations associated with the running of the mill" (R. 142). These include a timekeeper in the mill (R. 142). All these were maintenance employees (R. 142).

The dispatch control shack of the truck dispatcher is situated not in the mill, but in the mill yard (R. 166).

The method of harvesting and loading the cane onto the trucks is in general as described in the brief of the Board, except for the duties of the truck drivers. The cane cutters gather the cane into piles weighing about $1\frac{1}{4}$ tons, in slings. Each pile or bundle is then dragged to the side of the private road and loaded onto the trucks which carry from 16 to 18 of these piles in one load (R. 157). It does not appear that these trucks get a full load at one spot. The trucks travel along the road accompanying the traveling loading crane (R. 157).

II

**THE REPORT OF THE EXAMINER AND
THE DECISION OF THE LABOR BOARD**

The Board stated that it had considered the entire record in the case, and had adopted the Trial Examiner's findings of fact and conclusions of law, with two exceptions which the Board on its own initiative supplied (R. 78).

The following is a digest of the findings and conclusions of the Examiner and of the decision of the Board.

A. Report of the Examiner

The Examiner stated:

1. That Mair (the harvesting superintendent) had testified that the "central point of all trucking operations was at the mill, from which the trucks were dispatched and their operations controlled by the dispatcher who directed their operations by means of a radio phone" (R. 32) ;

2. That on an annual basis the truck drivers spent approximately 50 to 60 percent of their time on the public highways, and 40 to 50 percent on Company roads; that all loading and unloading of the trucks was done exclusively on the Company's property, and none on the public highway (R. 33) ;

3. That during loading and unloading the truck drivers had no duties except to stay with their trucks, move them as required, and chop off any cane sticks protruding from the vehicles (R. 33) ;

4. That during one month of each year the truck drivers worked on trucks at the Company's garage (R. 34) ;

5. That the same force of truck drivers hauled both Olaa's cane and the growers' cane from fields to mill, and spent *about* half their time hauling cane from the Company's fields, and half their time hauling cane from the independent growers' fields ;

6. That the job description for the truck drivers was originally prepared by the control dispatcher, checked with the industrial relations department, and then by Mair as the head of the department (R. 34) ;

7. That a condition precedent to the position of truck driver was the possession of a County of Hawaii vehicle operator's license (R. 35) ;

8. That an "examination of the *maps* discloses that the public highway system is the primary means of transportation between the various sections of the Company's lands and the sugar mill, and are the only hard surface roads in the entire area" (R. 29-30) ; and that although the total length of the private roads to the fields was substantial, Mair testified that the usual manner of operation was to route the vehicles of the public highways, then into the fields over the private roads, and then to bring the trucks out by the shortest route to the public roads and thence to the mill ; that considering the fact that loading and unloading occurred on Company property, and that such time was included in time spent on Company property "although the driver merely awaited completion of the operation,

it would appear that most of Banez's duties as a driver were performed on the public highway" (R. 53) ;

9. That the ratio prevailing between the area of Olaa's cane lands and those of the independent growers would be reflected in the work of the drivers, and that, "On that basis, they spend very nearly as much time hauling independent grower-raised cane as they do hauling company-raised cane" (R. 53) ;

10. That in view of all the foregoing, plus the fact that the truck drivers were required to have a County of Hawaii driver's license, "it would seem clear that Banez could not be considered an agricultural worker" (R. 53) ;

11. That in the series of cases the First Circuit Court of Appeals had held that the agricultural exemption would not apply to the *milling* operations of the company which milled the cane of independent growers and its own (citing *Bowie v. Gonzalez*, 117 F. 2d 11), and that the same Court later had specifically held that "the transportation of sugar cane is incident to milling rather than to farming, and therefore is not exempt under the Act" (citing *Calaf v. Gonzalez*, 127 F. 2d 934, and *Vives v. Serralles*, 145 F. 2d 552) ;

12. That since the Board had followed the rationale similar to that of the *Calaf* case in applying the Labor Act to the Sugar Industry, he felt obliged to follow that authority ;

13. The Examiner did not have the Supreme Court decision in the case of *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, but referring to the decisions of the Ninth Circuit Court of Appeals in that case he stated

that he was not persuaded that decisions of the courts interpreting the Fair Labor Standards Act could be accepted as limiting the interpretation and application of the National Labor Relations Act (R. 54-55).

B. Decision of the National Labor Relations Board

It is interesting to note that the brief for the Board contains in the appendix certain correspondence dated June 28, 1955, July 13, 1955, and July 19, 1955, between William R. Consedine, Acting Solicitor, United States Department of Labor, and Stewart Rothman, Solicitor of Labor (Br. 39-44). This correspondence was not a part of the evidence in the instant case. The Board's decision is dated October 20, 1955. The Board's discussion of the Supreme Court's decision in *Maneja v. Waialua Agricultural Co., Ltd.*, *supra*, seems to follow rather closely Solicitor Rothman's analysis thereof (R. 81-82).

The Board found that:

1. The *Clinton Foods* case, 108 NLRB 85, is not applicable to Olaa's truck drivers, but that, on the contrary, the general work of Olaa's drivers was more like that of the semi-drivers in the *Clinton Foods* case and not like that of the flat drivers, and was, therefore, industrial in character (R. 79-80);

(Acting Chairman Rodgers dissented on the ground that the Supreme Court's decision in the *Waialua* case required the Board to find that Banez was an agricultural laborer; that the fact that a part of the cane transportation was over public roads, and that the truck drivers did not haul laborers and equipment to

the fields, was not sufficient to differentiate Olaa's drivers from Waialua's railroad workers, and that the *Clinton Foods* case "which is now established Board doctrine" was controlling (R. 93-95) ;)

2. That the length of the haul in the Olaa case makes the *Clinton Foods* case inapplicable ;

3. That while the truck drivers spent about 38 per cent of their time at the roadside during the loading of the trucks, they "normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane sticks which might be protruding from the truck..." and that therefore the truck drivers, unlike the "goat-flat drivers" in the *Clinton Foods* case, performed no actual work on the farm itself "so as to be even engaged in an agricultural function," and that therefore the "part time" rule of the *Clinton Foods* case, upon which Acting Chairman Rodgers relied (R. 93-95), is not applicable to the instant case (R. 80) ;

4. That the time spent by the drivers at the plant during unloading was not work actually performed on the farm (R. 80-81) ;

5. That independent growers cultivated *about* as much acreage and grew about as much cane for processing at Olaa's plant as Olaa did, and that the Company's truck drivers spent *about* one half their time hauling the cane of independent growers, and that therefore *about* one half of the Company's trucking operation was an independent trucking operation conducted for the benefit of other employers (R. 81) ;

6. That although Olaa considered the transportation section as a part of its harvesting department, the truck dispatcher was located at the plant and supervised the work of the drivers from the plant, and that this indicated that the Company's trucking operation was carried on as an incident to or in conjunction with its plant operations, rather than its farming operations (R. 81) ;

7. The Board purported to distinguish the instant case from the decision of the Supreme Court in the *Waialua* case on the following grounds:

(a) That the Supreme Court stressed the dual function of the railroad employees in that they not only hauled cane from the fields to the mill, but that they also transported farm laborers and farm equipment to the fields on the railway extending throughout the plantation, and that the railway was used exclusively to effectuate the agricultural function of transportation of exempt agricultural workers to the fields, together with their equipment and supplies, and the dual function of hauling freshly cut cane to the mill, while in the instant case the truck drivers only hauled cane from the fields to the plant and have no connection with the cultivation of cane (R. 82) ;

(b) That the Supreme Court in the *Waialua* case expressly rested its decision on the fact that Waialua's transportation system was either in or contiguous to its fields, save the necessary trackage to the mill to accommodate cane cars arriving from the various sections of the plantation, and that in the instant case no part of Olaa's transportation system is in the fields

since the Board refused to consider the use of Olaa's private roads which were used by the drivers for the sole purpose of hauling the cane from the roadside of the fields to the plant as work performed on the farm, the general practice being then to drive the trucks over the public highways to the plant, and the drivers spent 60 percent or more of their driving time on the public roads; that although all of these private roads appeared to be contiguous to the fields, a considerable part of the public highways used were not contiguous to the fields, and that a long public highway not contiguous to any of the fields *must be used* to haul cane from Olaa's southern fields to the plant which was located in the geographically separated northern fields; that 60 percent or more of the *Company's transportation system* is on the public roads, while Waialua's entire system was on its own private railroad (R. 83) ;

8. That Wailua transported only its own-grown cane to its mill, while in the instant case the independent growers cultivated *about* as much acreage and grew *about* as much cane for milling by Olaa as Olaa did, and that Olaa's truck drivers spent about one half their time in hauling the cane of the growers (R. 83-84) ;

9. That in the *Bowie* case the Court held that the agricultural exemption under the FLSA did not apply to transportation employees who hauled cane grown by independent planters, and that in the *Calaf* case the Court held that the agricultural exemption was inapplicable to transportation employees hauling cane grown by their own employer, because the facts in that case showed that the transportation was, in the Court's

opinion, incident to milling rather than to farming; that the Supreme Court in the Waialua case recognized that both the above cases were distinguishable from the Waialua situation, and the Board stated:

“We conclude therefore that the agricultural exemption under the FLSA does not apply to transportation employees who, as here, haul both cane grown by the employer and cane grown by independent growers,”

and that therefore Banez was not an agricultural laborer (R. 84-85).

III

SPECIFICATION OF ERRORS

The Board committed error in finding,

1. That the central point of all trucking operations was at the mill, and that the work performed by the truck dispatcher was incidental to and hence a part of the mill operation;

2. That Banez, while driving his truck in and out of the fields and waiting for his truck to be loaded, was not performing any actual work on the farm;

3. That the fact that a part or even the greater part of the time spent by Banez after leaving the fields was spent on the public highways rather than on the Company roads, showed that while so driving Banez was engaged in work incidental to milling and not to agriculture;

4. That the time spent by Banez in driving along the roads in the field to pick up the bundles of cane at the

roadside, and in driving out of the fields with his load of cane, was "work performed on the farm" since the general practice was for him then to drive his truck over the public highway;

5. That the fact that some of Olaa's cane fields were not contiguous to each other, and the length of the haul, meant that Banez, because of this, was not, while driving, an agricultural laborer; and

6. That the Board's decision in the instant case is contrary to its earlier decisions on the matter of transportation from field to plant.

IV

DISCUSSION OF FACTS FOUND BY THE EXAMINER AND THE BOARD

1. *The truck dispatcher.*

The Examiner stated that witness Mair had testified that the "central point of all trucking operations was at the mill" from which the trucks were dispatched and their operations *controlled* by the dispatcher who directed their operations by means of a radio phone" (R. 32).

The Board stated that the dispatcher was located at the plant, and that he supervised the work of the drivers from the plant (R. 81). Witness Mair did not so state.

The mill consisted of only one building. There were no buildings appurtenant to it, except one very small building used as a welding shop (R. 141). The truck dispatcher's building was situated in the mill yard, but

it was not a part of the mill (R. 166). Olaa had a two-way radio-telephone system. Witness Mair did state that the trucks were controlled by the truck dispatcher who made out a weekly schedule of the sections or fields the drivers were to go to during the week; that when the drivers left the dispatcher's shack they were given directions as to what routes they should follow in reaching the fields. The plantation placed arrows and markers by the government roads leading into the field roads, and these showed precisely what roads were to be used in going into and out of the fields, and from the fields to the mill (R. 160-161, 163). Obviously, these arrows and markers are placed by the harvesting department, not by the dispatcher. The dispatcher simply tells a driver "go to section so-and-so and follow the arrows" (R. 161).

Witness Mair was asked, "What control do you have over your truck movements; is there any system of recording where the trucks are, when they arrive at what places and so forth?" and he answered, "Yes there is. We do it by radio-telephone" (R. 165). He explained this operation as follows: When the truck reached the field, the loading foreman, who had a radio-telephone in the cab of the crane, reported the arrival of the truck in the field, and if there was no truck ahead of it, he would report the time the truck arrived and when it commenced loading. If there was a delay he would report the time when loading began. Then when the truck was ready to leave the field he would report this. The dispatcher would note all these times in his log (R. 166-167).

It would seem to be necessary on any plantation that wanted to conduct its harvesting efficiently, and to avoid duplication and delay, to have someone do the above described work, and the logical place for a truck dispatcher would seem to be near the mill since it is important, not only that the trucks leave on a regular schedule, but also that their arrival in the mill yard be noted so that the mill may have the cane available as it is required.

The transportation system was, as stated by the Board, considered by Olaa as being a part of its harvesting department (R. 81), and the dispatcher was under the supervision and control of Mr. Mair as head of that department (R. 155). The Board obviously was endeavoring to bring the dispatcher within the decision in the *Calaf* case (127 F. 2d 934), a case in which the Central ground both its own cane and that of the colonos. We shall discuss that case later. We would state here that there is no suggestion that the drivers or the dispatcher were on the payroll sheets.

The routes to be taken by the drivers after they left the main plantation or public roads into the fields were controlled by the arrows and markers, which were not placed by the dispatcher, and their driving in the fields was subject to the control of a loading foreman who sat in the cab of the loading crane which moved along just off the field roads, picking up the bundles of cane (about $1\frac{1}{4}$ tons each) collected by the harvesting crew, and loaded them onto the truck which accompanied the crane, but which moved along the road. The trucks

would take between 16 and 18 of these bundles (R. 156-157).

We submit that there is nothing in the evidence that warranted the Board's deciding that because the truck dispatcher's shack was located in the mill yard, and because he supervised the truck drivers to the extent above shown, this "...indicates that the Company's trucking operation is carried on as an incident to or in conjunction with its plant operations, rather than its farming operations."

2. *The "work" performed by Banez.*

The Examiner and the Board decided that the time spent by the truck drivers in the Company's fields was not work or labor since, according to the Board, although they spent about 38 percent of their time at the roadside during the loading of the trucks, they "normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane sticks which might be protruding from the truck..." and therefore performed no *actual* work on the farm itself (R. 80).

In addition to driving in and out of the fields, the drivers follow the traveling crane along the field roads in order that the bundles of cane, weighing about 1¼ tons (R. 156) can be loaded on the truck, which carries from 16 to 18 of these bundles (R. 157), an item the Board ignored in its decision.

Irrespective of the amount of actual manual labor (as the Board terms it) involved, Banez could not leave his truck and go off on "a frolic of his own." He was

an hourly-paid employee (R. 36), and was paid, as he had to be, for his time spent in the field, as well as that spent during unloading.

Incidentally, we might add that the Examiner noted that during one month of each year the truck drivers worked on trucks at the Company's garage (R. 34). The Board did not mention this.

We shall discuss Banez's duties under "Law".

3. *Use of public and private roads.*

We submit that the fact that Banez spent a considerable part of his time in hauling Olaa's cane over the public roads, or that he may have spent 60 percent of his time in such driving, is wholly immaterial to the determination of Banez's status, and that the length of haul is equally immaterial, but since the Examiner, the Board and the Board's counsel have attributed so much importance to this point as a determining factor we are discussing it here.

The Examiner stated in his report: "I take it, that the ratio prevailing between the two types of land would be reflected in the work of the drivers. On that basis they spend *very nearly* as much time hauling independent grower-raised cane as they do hauling Company-raised cane" (R. 53).

The Board, which stated that it concurred in the Examiner's findings of fact said: "... The Company's truck drivers spend *about* one-half of their time hauling the cane of independent growers. Therefore, *about* one-half of the Company's trucking operation is con-

ducted for the benefit of other employers" (R. 81). Olaa cultivated 7418 acres. The growers cultivated 6911 acres, or 507 acres less, a factor which is important in connection with the Board's earlier decisions which will be referred to under "Law".

The brief for the Board refers to only one map—Exhibit 2-A—which counsel says will be presented to the Court during the argument (Br. 3). This map was a general and undetailed map, introduced to show the terrain of Olaa's lands, and to show the cane lands (R. 130-131). It purports to show only the public roads and the roadbed of the former railroad. No other private road was shown on it (R. 138-139). The printed record mentions "Exhibit 3" which shows the plantation roads (R. 138). The printed record contains a large number of figures in parentheses which, on checking, we find refer to the reporter's transcript. For example, from pages 136 to 175 there are at least 25 such references, and on page 146 the reference is "(see pages 302-306)" and on page 155 it reads "(see page 307)." At the bottom of page 131 of the printed record there is a reference to page 69 of the reporter's transcript, and that page shows that a series of four maps, fastened together, was introduced and marked 3-A, 3-B, 3-C and 3-D; that A shows the Olaa-Mountain View area (enclosed in light green on Map 2-A), which constitutes the major portion of the fields (Tr. 70-71); that B covers the land called Pahoa; that C covers the land called Kapoho, and that D covers the lands called Kamaili, Kaueleau, Kauaea, Malama, Pohoiki and Kapoho. These names are designated on 2-A. This "3"

series shows not only the plantation roads, but also the areas shaded in red, the lands of the independent planters. These maps are important and since counsel for the Board intend to produce Map 2-A at the hearing, we are forwarding the "3" series to the Court. The only difference between the forwarded and the original in evidence is that the copying machine, not being equipped to color the planters' areas in red, shows them in blue.

The witness Burns testified that Map 3-A shows both the public and the plantation roads, and that "the maze of lines in here are almost all of them plantation roadways" (R. 138-139).

We do not agree that an examination of the maps discloses that the public roads are the primary means of transportation between the various sections of Olaa's lands and the mill, or, as the Board puts it, that "the general practice is . . . to drive the tractor over the public highways to the plant" (R. 80). It is possible that in going from the mill to the fields the drivers use the public roads more than they do the plantation roads, but we do not concede that the Board was justified in finding from the evidence that the public highway system was used to a greater extent than the private roads in hauling Olaa's cane from its fields to its mill. Map 3-A, the Olaa-Mountain View area, shows the plantation's cane fields, marked "Field G" etc. The witness Mair testified that in harvesting the cane from Fields L, K, E, F, I, G, H, C, C-2 and C-3, they did not use any public roads, and that in harvesting Fields Q, P, O, D and J-2, they used the public roads "possibly 10

percent of the mileage" (R. 164-165). The record has Field T. This should be Field P. Map 3-A shows that Field T is quite some distance from the other fields named. The reporter may well have been misled by the similarity of the sound of the two letters.

The areas of these fields are not stated, but the map shows a scale of 1 inch=2000 feet. While Manager Burns stated that *in general* Olaa's fields averaged more than 60 acres per field (R. 150), as the maps show, these fields vary considerably in size. The Pahoa and Kapoho maps are on a scale of 1 inch=1000 feet, and Map D of the Kamaili etc. areas is on a scale of 1 inch=800 feet. Using the scale on the Olaa-Mountain View map, A-3, the total area of these 15 fields is well over 2000 acres, with Fields Q, P, O, D and J-2 comprising not quite one half of the total area. Deducting roughly 10 percent from this last area, and making allowance for the small parcels of planters' lands in that area, leaves at least 1900 acres out of Olaa's total of 7400 acres of its own cane land in or for which the public roads are not used at all.

With regard to the use of the old railroad roadbed, Manager Burns testified that "a large part of the roadbed that was formerly railroad-bed is now used as roads for trucking of cane" (R. 131), and the witness Mair, on being asked by counsel for the Board, "Is it correct to say that the senior cane truck driver all or substantially all the time, in hauling cane from the field to the mill, would use public roads to a greater or less extent?" replied, "... There are many times and many occasions where we don't use public roads at all. A cer-

tain number of our fields . . . In the Pahoa, Kamaili areas we use the public roads part of the time in all cases . . . And Olaa-Mountain View, many times we don't need them at all." At the left extremity of the Mountain View area, the truck driver might use the Volcano Road "going right into the mill" (R. 181-182).

In the lower portion of the cane areas, Pahoa down to Kamaili, etc., the trucks apparently usually use the public road in going down as far as Pahoa, but when going down below Pahoa Village they use the old railroad bed (R. 163). The record is somewhat confusing since apparently the junction points were not marked as such on the map. The foregoing apparently refers to the Pahoa area. It seems that in going from the Pahoa area to the Kapoho area, and the other lands below Pahoa, the trucks usually used the public roads, but that in returning they used the old roadbed. Witness Mair was asked, "So that you go down on the main highway and back on the old railroad bed, is that correct?" and he answered, "Correct" (R. 164).

Counsel for the Board on cross-examination asked the witness Mair if it was a fair estimate to say that Banez would be hauling planters' cane for about half the working day, as distinguished from Olaa's cane. The witness replied that he would not put it on that basis; that about half of the year there would be many days when "we would be hauling plantation cane exclusively and other days we might be hauling planter cane exclusively." He was then asked, "So that you would put it on the basis of an overall annual average that approximately half the time would be spent in hauling

planters' cane, is about what it amounts to?" and he answered, "Correct" (R. 182-183). Then counsel proceeded to a discussion of the relative time spent in driving over public and plantation roads, suggesting that about 70 percent was spent on the public roads. The witness answered by taking two areas, the Mountain View section and the Pahoa area, as comparable for harvesting and hauling, stating that the times and distances were comparable. The Mountain View area is the upper portion (toward the Volcano) of the Olaa-Mountain View section. The far end of the Mountain View area is about 14 miles from the mill, and the Pahoa area is about the same (R. 180). If the trucks ran only on the public road *going to* the fields, the elapsed time would, for both ways, going and returning, be about the same—one hour and 10 minutes (R. 184). This figure excluded the travel in the fields which would be about 40 minutes, according to the witness (R. 184). Counsel for the Board again attempted to have the witness give a figure of around 72 percent as the time spent on the public roads, but the witness stated that he had always had in mind the figure of 50-50 (R. 185-186). He stated that for 1953, the year in question, the unloading took considerable of the drivers' time due to slow unloading, and that in his answers he may not have given quite enough weight to that fact. He stated that this matter of the time and distance element was "quite new" to him (R. 188). Then counsel for the Board had him eliminate the time spent in the fields and at the mill, and limit his answer only to the time spent in driving over the public road,

and he stated that on that basis the time would probably be increased slightly; and in response to another question he stated that if the loading and unloading time was eliminated, and considering only the actual driving time in the fields and on the roads, he would try to estimate, and he gave the figure of around 60 percent for driving time on the public roads (R. 190). The witness stated that he did not want to be specific (R. 191). Counsel asked him if he wanted time to study the question (R. 190). The printed record at this point shows several omissions from the reporter's transcript. The last two paragraphs on page 190 of the printed record refer to pages 158 and 159 of the reporter's transcript. The omission is important and we are quoting from it.

When counsel asked the witness if he wanted time to study the matter, the Examiner interrupted him and stated that counsel had gone far enough. Counsel replied that this matter was one of "first impression, I think, to some extent," and he added, "I appreciate your patience and your indulgence. . . ." The Examiner replied, "You will appreciate it much greater when you know that I disagree with the entire affair . . . on all this matter. I think you gentlemen are relying on this Clinton Foods case to a great extent." Counsel for the Board replied, "Yes," and the Examiner continued:

"And I have seen some cases which I think have shown rather lack of reality on the part of the Board, and this is one of them. If you are going to follow this case, I think you are going to follow

precedent which is entirely questionable. . . ." (Tr. 158-159)

The record is not as clear as it might be on the relative use of public and private roads, but assuming for the purpose of this discussion that this matter is at all material, we are calling attention to two factors which the Board did not consider in its decision: (1), for approximately 2000 acres at a minimum of the Olaa section (more than one fourth of Olaa's total cane area), the truck drivers did not use the public roads at all; and (2), in the Mountain View section the drivers returning from the fields drive about two miles over private roads before hitting the public road (R. 165). The travel is faster over the public road than over the private roads, the latter being unpaved (R. 168). A truck would require 25 to 30 minutes to reach a field in the Mountain View section, and about the same time to return, loaded, to the mill, whereas a trip to and from Pahoa would take 50 to 60 minutes each way, the time required for going to and from the areas below Pahoa being greater (R. 168). As the 3-B, 3-C and 3-D maps show, Olaa's cane areas in these lower lands constitute a small portion of its total cane area. It is obvious that considerably more time is spent in hauling Olaa's cane over its own roads than is spent in hauling it over public roads.

The Board also lays much stress on its statement that no part of Olaa's transportation system is in the fields since, as the Board stated, it did not consider the "use of the Company's private roads by the drivers for the sole purpose of transporting the cane from the road-

side of the fields to the plant as work performed on the farm, where the general practice is then to drive the trucks over the public highways to the plant. . . .” and where a considerable portion of the public highways used are not contiguous to the fields. Olaa has 340 miles of *field* roads over which its cane is transported.

Map, Exhibit 3-A, shows the Olaa-Mountain View area, and it will be noted that the public road system from the far end of the Mountain View section down to the mill runs through this section and along the cane fields in the section. Naturally, it cannot be “contiguous” to every field in the area. This would be impossible in any plantation of any size. It runs through the heart of the cane area. The dividing line between the Olaa portion and the Mountain View portion is the dotted line marked “13 Mile Road” on Map 3-A. The cane area is contiguous from below the mill to the upper end of the Mountain View portion. The mill is located in the Olaa portion and is surrounded by the Company’s cane fields (R. 149) and the Olaa-Mountain View section constitutes the major portion of the Company’s fields (Tr. 70-71).

The only portion of the public road system that does not run through the cane fields is the 14-mile stretch that runs from the Olaa section down through the barren lava flows into and *through* the Kapoho area, and thence again down through the lava flows to and *through* the Kamaili etc. fields near the ocean, as shown on Map 2-A. As already stated, these waste areas are not cultivable in cane, and the plantation fields are as

contiguous as is possible in view of the nature of the land.

The Board was unable to say that the time spent in hauling the planters' cane was as much as that spent in hauling Olaa's cane. It had accepted the Examiner's finding of fact that this ratio was correctly determined by the relative areas of plantation and planters' fields, and consequently it resorted to and based its finding on the purported length of time spent by Banez in driving over the public roads, but even then, it excluded the time spent in driving in and out of the fields and during the loading.

4. *Driving over the field roads.*

We are wholly unable to fathom the Board's reasoning in holding that "the use of the Respondent Company's private roads by the drivers *for the sole purpose* of transporting the cane from the roadside to the plant was not work actually performed on the farm." The Board obviously decided that this was so for the reason alleged by it that "the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of their driving time on the public highways." (R. 80)

The fields are on the farm; the roads into and through the fields are on the farm; Banez, while driving on these field roads, was working on the farm; he was working while driving his truck with the traveling crane along the field road to pick up the 16 to 18 bundles of cane along the roadside; and, as we shall later show, he was engaged in work on the farm while

waiting for each load. This was certainly transportation, and the fact that after leaving the fields he would sometimes, or even the greater part of the time, drive to the mill on the public road rather than on a plantation road, and in the Mountain View section usually traveled for about two more miles on Olaa's roads before hitting the public road (R. 165), cannot change the fact that all of Banez's driving before hitting the public road was in agriculture, and under the supervision of the harvesting superintendent and in his department, transportation being a part of the harvesting department (R. 139).

So far as we can ascertain, this is the first time this theory has been advanced by the Board or any other tribunal.

5. *Length of Haul.*

The record shows that a great deal of time at the hearing was devoted to a discussion of the lack of contiguity of portions of the public highway system to the fields, and more to a discussion of the length of the haul. This caused the Examiner to express his opinion of the materiality of both factors, as we have previously shown.

Except for the reference to the three-mile haul in the *Clinton Foods* case, 108 NLRB 85, this haul being apparently over the public roads, we have found no cases where the Court or the Board have considered this a material factor. In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, where the Court said that the "transportation of crops so that spoilage can be pre-

vented is usually considered part of harvesting" (p. 403), the fields of the growers were anywhere from one half to 18 miles from the company's plant. The Court made no reference to length of haul and presumably did not consider this material. Cases involving area of production may not be strictly pertinent, but it is to be noted that in such cases the areas have had varying radii, some of them considerably longer than the length of haul at Olaa. In *Walling v. Rocklin*, 132 F. 2d 3, the company's shop and shipping headquarters was in Sioux City, Iowa, while its greenhouses and gardens were partly in and partly out of the city. The Court apparently was not concerned with the length of haul.

This point seems to be, as counsel stated at the hearing, a matter of first impression. As a matter of fact, we cannot see the difference in theory between a haul of three miles over a public road and a longer haul where, in either case, the road does not run through the fields of the processor.

V LAW

1. *Section 3(f) of the Fair Labor Standards Act.*

This section defines "agriculture" as including farming in all its branches, including, *among other things*, the specific activities mentioned in the section, "and any practices . . . performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations."

The specific activities mentioned are not exclusive. The phrase "among other things" shows that Congress did not purport to limit the definition.

As stated by the Supreme Court, "the exemption was meant to embrace the whole field of agriculture... From the very beginning of the legislative consideration of the Act, a comprehensive exemption of agricultural labor was a primary consideration of the Congress."

Section 3(f) was, "perhaps, the most comprehensive definition of agriculture which has been included in any legislative proposal" (*Maneja v. Waialua Agric. Co.*, 329 U.S. 254; 99 L. Ed. 1040, 1050-1051).

During the passage of the Bill through Congress, one suggested definition was, "and any practice *ordinarily* performed by a farmer as an incident to any farming operation." The word "ordinarily" was omitted in the final draft.

With regard to the cases cited by counsel for the Board on page 26 of their brief as to the strict or narrow construction of exemptions, the dictionary definitions of the words "exemption" and "exception" make one wonder why so many of the courts have used "exemption" instead "exception", or why so much emphasis has been attributed to the word "exemption" (see *Waialua Agric. Co. v. Maneja*, 216 F. 2d 466, 470-471). However, in construing the exemption, due regard must be accorded to the plain language of the Act, and the intent of Congress. The Act was drawn to accomplish two results: (1) To benefit labor, and (2),

to make specific beneficial exemption provisions for a certain class of employers described in the Act; and its "remedial" provisions apply to activities excepted by the statute to the same degree and in as full measure as those which, in their nature, were intended to be brought in their entirety within the orbit of the statute if the evidence shows that the claim of exemption is supported by adequate proof (*McComb v. Hunt Foods*, 167 F. 2d 905).

For the purposes of this case, we do not contend that Olaa's employees, when hauling to its mill the cane of independent growers, are engaged in agriculture. We do submit that when the truck drivers are hauling Olaa's own-grown cane from its own fields to its mill they are employed in agriculture.

The Board stated in its decision:

"We conclude . . . that the agricultural exemption under the Fair Labor Standards Act does not apply to transportation employees who, as here, haul both cane grown by their employer and cane grown by independent growers." (R. 84-85) apparently basing this statement on the three cases cited by it (R. 84).

2. *Banez was exempt as an agricultural laborer.*

(a) *Transportation as "incidental" to harvesting.*

Sec. 3(f) does, as stated by counsel, provide that "delivery to storage or market" is an activity performed by a farmer or on a farm as "an incident to or in conjunction with *such* farming operations," but we do not follow what we gather to be counsel's reasoning

that the transportation of the owner's cane from his fields to his mill is not an activity incident to or in conjunction with harvesting where the farmer transports his own cane to his own mill; nor do we agree that the cases cited on page 27 lay down any such a proposition. The second portion of Sec. 3(f) applies to all the farming operations. The cane cannot be transported until it is harvested. Transportation follows the harvesting, but to say that it follows from this that the hauling is incident to or in conjunction with harvesting only, seems a very strained interpretation of both the language and the intent of the section. Counsel's reasoning seems to be based on the familiar fallacy of "*post hoc propter hoc*."

Because tillage of the land follows its clearing, and irrigation precedes and sometimes accompanies cultivating, and cutting the cane follows its cultivation, one is not an incident of the other. All are a part of the agricultural process.

The cases cited by counsel as holding either that the transportation of crops from field to mill is not exempt at all, or that if, to be exempt, it must meet the second branch of the exemption, i.e., exempt if performed by a farmer or on a farm (Br. 27), are no authority for the statement that the courts do not regard delivery to storage or market as harvesting, but as activities incident to or in conjunction with harvesting only.

In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, the Court said that "the question is whether the activity in any particular case is carried

on as a part of the agricultural function, or is separately organized as an independent production activity," and "there is the additional requirement that the practice must be incidental to *such* farming."

In speaking of the second branch of the definition, the Court said:

"Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidental to or in conjunction with 'such' farming operations."

The court stated that the company's employees (whose duties stopped at the boundary between the company's water system and the lands of the farmers) were not engaged in farming since the company owned no land and raised no crops, and the second branch of the definition is limited—"Such practices are exempt only if they are performed by a farmer or on a farm." (p. 766)

In *Chapman v. Durkin*, 214 F. 2d 360, Chapman was a "bird dog" operator who bought fruit unfit for packing and sale in its original condition and sold it to canning factories. He owned no farm and grew no fruit. Clearly his activities in hauling the fruit from the groves to his place of business were no part of agriculture; he was not even a processor. The language of the Court was applied to the specific facts in the case.

In this connection see *Chester C. Fosgate & Co. v. U.S.*, 125 F. 2d 775, and explanation of the decision of that case in *Lake Region Packing Assn. v. U.S.*, 146 F.

2d 157, 159, Note 3, and *N.L.R.B. v. John W. Campbell, Inc.*, 169 F. 2d 184. The distinction between these cases and *Chapman v. Durkin*, *supra*, is recognized by the Court in the *Chapman* case.

We do not find any statements by the Courts in the other cases cited on page 29 that indicate that those Courts so limited "transportation".

The Court in the *Bowie* case, 117 F. 2d 11, at 18, said:

"The processing of the colonos' sugar cane is incident to or in conjunction with milling operations of the appellants and has no connection with their farming activities."

In the *Calaf* case, 127 F. 2d 934, 936, the Court said:

"The issue, therefore, is not whether the same owners manage and control the mill, the farms and the transportation system, but rather whether transportation is incident to farming or incident to milling. . . ."

Moreover, Sec. 3(f) uses the phrase "in conjunction with." The word "conjunction" as ordinarily understood means the state of being conjoined, united, or associated.

Hume v. U.S., 118 P. 689, 695;

Highland v. Empire Nat. Bank of Clarksburg, 172 SE 544, 549.

In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, 402, the Court said that the trial court "should explicitly find as a fact whether the transportation from the field was or was not *part* of the harvesting activity

or an activity closely enough connected therewith to warrant that the truck driver was employed in agriculture, or, on the other hand, that the alfalfa chopped as a *part* of the harvesting was sufficiently changed in character by the time it reached the truck so that it was no longer an 'agricultural' commodity in its 'raw or natural state'," and the Court added:

"... When the truck is fully loaded it proceeds to defendant's premises, its place being taken by another truck.

"There cannot be much doubt but that the entire process is harvesting. . . . There can be no distinction between a harvesting operation and an activity incident thereto, since Congress . . . included both in the broad definition of 'agriculture'. The failure of the trial court to specify under which branch of the definition the harvesting activities here fall is without importance. The briefs which attempt to make a point of this failure emphasize a distinction without a difference.

(b) *Transportation by Olaa of its own cane was work performed by a farmer or on a farm, although a part of the haul was over public highways.*

The *Chapman* case, 214 F. 2d 360, 363, cited by counsel (Br. 28) is not at all in point. Durkin was in no sense a farmer, nor a producer. Except for the fact that his employees picked some of the fruit he bought, the Court found his operations similar to those of a broker. The Court correctly held that his employees who hauled the purchased fruit from the fields of the growers to Chapman's plant were not engaged in agriculture.

The *Farmers' Reservoir* case, *supra*, is to the same effect. We shall discuss the *Waialua* case later on, but we would state here that counsel's statement (Br. 28) that "Except in the case of a large plantation embracing both farm lands and a mill . . . transportation of a farm product to a mill normally embraces travel on the public highways" is not entirely correct. The last portion is correct, the first portion is not. Except perhaps for *Waialua* (so far as the record in that case shows), there is probably not a sugar plantation in Hawaii that does not do a part of its hauling over public roads. *Olaa* is not unique in this respect. As the Court said in the *Waialua* case, "Certainly no one would argue that the agricultural exemption did not apply to farm laborers who took the cane to the plant in wheelbarrows," (349 U.S. at 26). They would normally have to use the public roads.

The Wage and Hour Administrator, before the decision in the *Bowie* case, ruled as a matter of contemporaneous construction of Sec. 3(f) that, "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included [within the exemption]." (See 349 U.S. at 263, Footnote 4; 99 L. Ed. at 1052). The Administrator made no reference to length of haul, nor to the matter of transportation over public highways versus company roads, and the Supreme Court stated that he had not changed his ruling up to May, 1955, so far as concerned the transportation of the farmer's own cane (*Maneja v. Waialua*, 349 U.S. at 262).

The law is too well settled that the size of a farm, ranch or plantation is immaterial to the application of Sec. 3(f) to require citation of authorities (see *Addition v. Holly Hill Fruit Products*, 322 U.S. 607; 88 L. Ed. 1007 at 1011).

Apparently counsel's position is that no matter how much of the public roads pass through the heart of the Company's fields, as they do in the Olaa-Mountain View Section, from the upper end of the section to the mill, which is situated in that section, and as they do through all the lower areas from Pahoa down, the fact that the public road is used prevents Banez from being an agricultural worker, although, as we have shown earlier herein, all the transportation system was a part of the harvesting department, under the control of the harvesting superintendent, a part of whose duties was to finally approve of the job description of Banez's position as senior truck driver (R. 155); that the duty of the truck dispatcher was only to tell Banez to what fields he should go, and what route he should follow in reaching the sections, where Banez would then follow the direction signs placed by the harvesting department, the dispatcher also keeping a record of the arrival of the trucks in the fields and their departure therefrom.

While we do not agree that Banez spent approximately 60 percent of his time in driving over public roads, and only 40 percent over private roads, the ratio is immaterial, and so is the distance. We have been unable to find any decision or ruling that where even a major part of the transportation of the owner's cane

to his mill is over a public road, this precludes his drivers from being agricultural employees. As counsel for the Board stated during the trial, this, and the distance factor, was rather a case of first impression. (Tr. 158-159). Of course, if Olaa were not a farmer when growing and transporting its own cane, a different situation would be presented.

In the *Clinton Foods* case, 108 NLRB 85, the groves were two to three miles from the plant. It does not appear whether the road or roads used was or were public.

In *Holtville Alfalfa Mills v. Wyatt*, 230 F. 2d 398, the company bought alfalfa from farmers within a radius of from 1½ to 18 miles from its plant. It seems from the opinion that if the chopping of the alfalfa did not change it from its raw or natural state, the Court would have ruled that the drivers who hauled the alfalfa from the fields of the growers to the company's plant were agricultural employees, the Court also stating that:

“Transportation of crops so that spoilage can be prevented is usually considered part of harvesting.”

The hauling in that case was not done on a farm (p. 4032).

In *Vives v. Serralles*, 145 F. 2d 552, the distance of the hauls directly from fields to mill, and the relative use of public and private roads, were not discussed in holding the group 2 employees exempt.

In *Lee Wilson & Co. v. U.S.*, 171 F. 2d 503, where the company had a 50,000-acre farm and five alfalfa mills, and where the transportation from field to mill was held to be agricultural labor, the issues of distance or use of public roads were not discussed. The Court, however, noted that the mill in question was located on the company's own land.

While decisions under other sections of the Act, such as, for example, the "industry" exemptions, are not strictly relevant to decisions under Sec. 3(f), the opinion of the Court in *Oquendo v. Fernando Alvarez & Co.*, 2 W.H. Cas. 600 (U.S.D.C., Puerto Rico), is of some interest. There the plaintiffs were employed by the defendant in processing tobacco bought by defendant and by it hauled to its warehouse where it was graded, fermented and stored, and then transferred to its factory where the plaintiffs worked on it in order to prepare it for market. The defendants claimed their exemption was based on Sec. 13(a)(10). The Court said:

"An establishment may include several buildings and the buildings need not be located on adjacent lots. In fact, there may be a considerable distance from one building to another. If, in the instant case, we assume that the warehouse at Guayanabo is some 40 or 50 miles from Bega Baja (where plaintiff worked), the two places may still constitute a single establishment if it appears that it is necessary to do part of the work for preparing for market at one place, and complete it at another."

Due, we believe, to the novelty of counsel's contention, we have been unable to find any other decisions that might seem pertinent, and apparently, in view of the cases cited by counsel on p. 28 of their brief, they may have experienced the same difficulty, but as the Court stated in the *Waialua* case, if *Waialua* had not owned its own mill, its transportation activities from field to mill would come within the agriculture exemptions covering delivery to storage etc., and, as the Court also stated, Congress did not intend to deprive farmers who have their own mills of the exemptions which it affords to farmers who do not (349 U.S. at 261), and in discussing this point the Court was obviously not interested in whether the transportation by wheelbarrow or otherwise was over public or private roads, nor was it interested in the distance of such transportation.

By parity of reasoning, the same is true of *Olaa*. The Company's fields are as contiguous to each other as it is possible to have them. The greater portion of its area—the *Olaa-Mountain View* section—is on one tract, in which the mill is situated. The lower areas are separated by areas covered by lava. In this connection it is interesting to note that an eruption about two years ago has destroyed or rendered inaccessible about one third of the land of *Kapoho*, and the Company has also been compelled to abandon all of *Kamaili* and *Kaueleau* (Map 2).

There can be no valid reason why *Olaa* which, because of the nature of its lands, cannot have all its fields in one compact area, should be penalized, in com-

parison with a plantation more fortunately situated, nor do the authorities require such a discrimination.

(c) The transportation by Olaa of its own cane to its own mill was an agricultural operation, not incidental to milling.

The authorities cited by counsel to sustain their contention that "Olaa is not a farmer in handling cane grown by independents, and even the transportation of Olaa-grown cane was incidental to its milling rather than its farming operations," do not sustain the last part of this contention, nor do the facts warrant any such a statement.

We do not contend that the mill employees were employed in agriculture. The Supreme Court in the *Waialua* case stated:

"From a consideration of all the relevant factors, the question would be an extremely close one in gauging whether this milling operation is farming or manufacturing."

It seems that the majority of the Court were influenced to a considerable extent by what they found to be the ratio between the number of plantations in Hawaii and the number of independent growers whose cane they processed. It is possible that the fact that Waialua would not be hurt by this ruling since it was already paying the mill employees more than the required minimum wage, and that the 7(c) exemption also gave it almost complete relief from overtime, also influenced the majority (349 U.S. at 274). Three Justices felt that the mill employees were engaged in

agriculture, but we must, at least for the present, accept the decision of the majority as the present law in the Hawaii Sugar Industry, and Olaa's mill employees are not exempt no matter whether they process plantation cane alone, or also process that of the growers under their existing agreements.

It is to be noted that counsel do not, as they cannot, state that Olaa processes a greater amount or even an equal amount of the cane of the planters, as compared to its own cane, nor that the truck drivers spend more time in hauling planters' cane than they do in hauling Olaa's cane. We shall take up this point under a consideration of the Board's other decisions.

The cases cited by counsel (Br. 29-30).

In *Bowie v. Gonzalez*, 117 F. 2d 11, the district judge, according to the First Circuit Court of Appeals, had held that the farmers engaged in transporting their own cane were exempt because they were engaged in an agricultural operation, and that those engaged in transporting the cane of the independent farmers were not exempt. The employees had not appealed and the appellate court stated that when the case was sent back to the District Judge for modification of his rulings he was correct in excluding those employees who hauled the central's cane.

In *Calaf v. Gonzalez*, 127 F. 2d 934 (Br. 27), where the central ground both the plantation cane and that of independents, the Court said that the precise problem before it was not decided in the *Bowie* case, i.e., whether the employees who carried cane exclusively

from their employer's farm to its mill, were covered by the Act. The Court noted that the same cars that hauled the central's cane, and the same employees who operated and maintained the cars, were involved in the hauling of cane and the maintenance and operation of cars which hauled the cane of the independents, and that while it was possible to show the segregation of the cane of the independents, none was offered to show a segregation of the cane grown by the defendants individually on their own farms, as distinguished from the farms owned by them jointly, but the Court said:

"We place our decision, however, on the broader ground that the transportation of sugar is *incident to milling rather than to farming*, and therefore is not exempt under the Act."

and the Court added:

"The mere fact that in this case the owners of the farm are also the owners of the mill and the transportation facilities does not make transportation *incident to farming*. The issue, therefore, is not whether the owners manage and control the mill, the farm and the transportation system, but whether transportation is incident to *farming*, or incident to milling. . . ."

The Court went on to bolster this ruling by stating that the workers were all employed by the central, their names were found on the payroll sheets of the central, the locomotives and cars had their depot at the mill, and moved from the mill to the farms and back, and the transportation employees did no agricultural work. The Court hedged by stating that "if the evidence dis-

closed that the heart of the transportation system and the situs of the employment of the workers were located at the farm," the Court would be presented with a far different situation; but the Court then added:

"There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands, that therefore those employees who are engaged in an activity which is *separate and distinct from agriculture* are exempt from the provisions of the Act."

In other words, the Court went back to its earlier statement that "transportation is incident to milling in all cases."

Counsel for the Board in his line of questioning of the witnesses attempted to bring the Olaa situation on to all fours with the *Calaf* case.

With regard to the *Calaf* case, the author of the annotation, following the opinion in the *Waialua* case (99 L. Ed.), states at p. 1067 that:

"The broad view that transportation of sugar cane from an employer's farms to the employer's mills is not covered by the agricultural exemption, was taken in *Calaf v. Gonzalez* . . . This view is inconsistent with the holding of the United States Supreme Court in *Maneja v. Waialua Agricultural Co.*"

The *Calaf* case arose to plague the Court in the later case of *Vives v. Serralles*, 145 F. 2d 552. We must confess to some difficulty in analyzing the decision, especially in view of the syllabus. The employees were divided into two groups. The syllabus (parag. 2) ap-

parently relates only to the first group. The second group hauled cane from the fields to the mill, some operating tractors and others driving ox carts. The witness, Villafrance, a tractor hauler, certified that he and his fellow operators, and also the ox cart drivers, "worked in the transportation of sugar cane." The Court held that these employees in group two were exempt, purporting to distinguish the *Calaf* case where the drivers were paid by the mill, while those in both groups in the *Serralles* case were employed and paid by the field department; that the area of activity to which coverage was extended in the *Calaf* case began at the mill and ended at the concentration point, while the situs of the activities in which the employees in the instant case were engaged was the field. The Court stated that if it were to rest its decision on the rationale of the *Calaf* case, it would hold the concentration point as the line of demarcation between transportation as an incident to milling, and transportation as an incident to farming, but that the *Serralles* case was controlled by Secs. 13(a), (6) and 3(f) of the Act, and the Court stated that the plaintiffs were agricultural workers. It rather seems to us that in the case of the employees in group two, the Court found that the concentration point was at the mill.

It is to be noted that the Court (p. 555) found it necessary to reconcile the Fair Labor Standards Act with the 1937 Sugar Act passed by Congress for the Sugar Industry of Puerto Rico.

In so far as any of the Puerto Rico cases may be said to hold that the transportation by a farmer of his

own cane to his own mill or the mill of another for grinding is not agriculture, those cases are not the law today.

Counsel purport to assimilate the facts in the present case with the Court's findings of fact in the *Calaf* case.

There is no evidence that the headquarters of the transportation system was at the mill. True, the truck dispatcher had his shack in the mill yard where he kept a record of the departure of the truck drivers for loads, told the drivers what roads to take to reach the fields, at which points they took the roads indicated by arrows or other signs presumably placed by the harvesting department, and he kept a record of the time they arrived at the loading places in the fields and the time they left to return to the mill. The dispatcher was not a mill employee. The mill employees were limited to the 170 employed at the mill itself in the factory or milling operations and the service operations associated with the running of the mill, called by counsel for the Board at the hearing, and by Manager Burns, as "maintenance employees" (R. 142-143). The entire mill operation was under the factory superintendent. The transportation section was under the harvesting department, which in turn was under the field superintendent (R. 139). The truck dispatcher was under Mr. Mair, the head of the harvesting department (R. 155). While he made out, in the first instance, the specifications or job description of the duties of Banez as a senior truck driver, these were subject to the approval of Mr. Mair as head of the department (R. 155), and Banez was under his jurisdiction (R. 160). When

a vacancy occurred in the job of a senior truck driver the dispatcher, who was the immediate supervisor under Mair, notified Mr. Mair, who also was required to approve of the application form for additional personnel for the cane transportation trucks (R. 169). During the harvesting season, since cane will spoil if not speedily milled, the transportation of the cane is an "around the clock" operation (R. 160). Any large agricultural operation, whether a sugar plantation or a fruit or other farm, that has to haul its produce from the field to the processing plant, must, to prevent confusion and waste of time, keep some control over and record of the operations of its transportation trucks. Olaa had approximately 33 of these trucks going to different fields. The mill had to be kept grinding during the harvesting season, and if no coordination were exercised over the movements of the trucks, both field and mill operations would be disrupted. This could not take place in the fields. It had to be located at one central point at or near the mill, but it was still a part of the transportation division.

There is nothing in the record to indicate that either the dispatcher or Banez was on the payroll sheets of the mill. They were a part of the field division and the presumption is that, like the witness Villafrance in the *Serralles* case (145, F. 2d at 554), they were on the payroll of the field or harvesting department.

In *North Whittier Heights Citrus Assn. v. NLRB* 109 F. 2d 76, the employees were all working in the packing sheds of a co-operative association which processed the fruit for the members of the association and

others for marketing under a marketing contract with an independent organization, and the fact that the growers are members of such an association does not make the packing or selling by the association, packing or selling by the growers. The Court properly found that the growers who produced and delivered the fruit to the association for processing, etc., were engaged in agricultural labor, but that the work done by the association's employees in the packing sheds was not agricultural labor.

In *Idaho Potato Growers v. NLRB*, 144 F. 2d 295, the Idaho Potato Growers, Inc. was, according to the Footnote, a corporation. There were other corporations, partnerships and individuals involved. All except the Traffic Association were potato dealers. The Idaho Potato Growers was a co-operative enterprise which did not buy the potatoes in which it dealt, but which shipped them for the account of farmers, both members and nonmembers, and for the account of other dealers. A few of the dealers grew a small portion of the potatoes they handled. The Idaho Potato Growers, Inc. did not. After a dealer had agreed with a grower to buy or handle the grower's potatoes, the potatoes had to be sorted according to grade and packed for shipment. This work was done either in the warehouse of the dealer or in the grower's cellar, by one of the crews in the employ of the dealer. The operations of these dealers seem to be pretty much in the nature of brokers, except for the addition of the work of sorting and grading, which was a part of the dealers' operations.

The Court held that the warehouse employees who sorted the potatoes in the cellars of the growers were not agricultural laborers. It found that their status was similar to that of the laborers in the *North Whittier* case above discussed, and to those in *NLRB v. Tovrea Packing Co.*, 111 F. 2d 626.

Irrespective of the correctness of the Court's decisions, the *North Whittier* and *Idaho Potato Growers Association* cases have no application to the production and transportation by Olaa of its own-grown cane.

In *NLRB v. Tovrea Packing Co.*, 111 F. 2d 626, the company was engaged in a general meat packing business, buying, feeding, slaughtering, processing and marketing livestock. It apparently raised no cattle of its own, although it apparently had several ranches on which it grew feed, a portion of which was fed to cattle on the ranches, apparently after they had been purchased. The cattle were moved from the ranches or fields to feeding pens adjacent to the packing plant. The employees involved worked in the feeding pens and feed mill which were adjacent to the packing plant.

The Court found that the cattle were kept in the feeding pens for a short time and fed intensively to fatten them for slaughter. The Court said that labor on a cattle ranch is agricultural, but that the facts did not present a case of stock raising or feeding as an incident to a stock ranch, nor of stock feeding or conditioning as a separate activity, but that the facts showed that the stock, ready for conditioning and fattening, were confined in the pens and fed as an incident

to a meat slaughtering and packing industrial enterprise, and the Court said it could find no effective relationship between the packing plant and its adjacent mill and pens, and the company's ranches.

We do not see what bearing this case has on the instant case.

Counsel's statement that "so far as the record shows, Banez may on occasion transport both Olaa-grown cane and independent-grown cane in the same truckload" is not borne out by the record. The record shows that each field is harvested separately, and that the truck driver moves along the field road until his truck is loaded (R. 155-159). A mixture of the plantation and of the growers' cane in the same truckload would be in violation of Olaa's contracts with the growers, whether under a cane-purchase agreement or a toll agreement. The grower's cane must be weighed separately, as otherwise he would not know whether he is properly recompensed.

The cases cited in the Footnote 17 at the bottom of pages 30-31 of the brief are irrelevant. The Board's jurisdiction is controlled by Sec. 3(f) of the Fair Labor Standards Act, not by the Wage and Hours Law. This case does not involve such specific exemptions as those for handling, slaughtering and dressing livestock, first processing, canning, etc., some of them being "industry exemptions". The fact that under the Wage and Hour Law the Administrator and the Courts hold that if an employee, during any work week, spends a part of his time in exempt work, and a part in non-exempt work, he is entitled to the minimum wage and overtime for

all work performed during that week, is immaterial to the question whether Banez is an agricultural laborer in this case.

(d) *Banez was working while in the fields and at the mill.*

The Board held that the drivers while in the fields normally just stand around while others do the loading, and do nothing more after the truck is loaded than to slash off the ends of cane protruding from the truck, and that consequently they "perform no actual work on the farm itself so as to be even partly engaged in an agricultural function."

While the brief for the Board does not discuss this point, it was an important factor in the Board's decision. Banez was an hourly-paid employee. While in the fields he did not merely stand around doing nothing except to cut off cane ends. He had to do more than this (see Olaa's brief, pp. 17-18). He apparently did stand by in the mill yard while his truck was being unloaded, but he was in charge of his truck at all times. This was all a part of his regular duties for which Olaa had to pay him as his contract wage. He was at all times during the working day subject to and under the control of the Company.

We have not been able to find any decisions under the National Labor Relations Act on this point, but it would naturally arise under the Wage and Hour Law.

Banez was certainly working on Olaa's farm while he was driving his truck from point to point through the fields, and he was on duty and required to take

whatever affirmative action was necessary at any time, or in connection with his duties as a truck driver. Both while in the field and at the mill he was engaged in "work" within the meaning of the Fair Labor Standards Act.

In *Thrasher v. Handler*, 10 W.H. Cas. 103, the Court said:

"The term 'work' as used in the findings of fact is used in the sense that it is used in the Fair Labor Standards Act. It doesn't mean that the plaintiff was engaged in actual physical labor for the full eight hours a day, but he was on duty during that time, and under his contract of employment was required to do whatever was necessary to keep the lease in operation. . . ."

See

Travis v. Ray, 41 F. Supp. 6;

Walling v. Blue Mountain Logging Co., 6 CCH Lab. Cas. Par. 61, 466;

Walling v. Halliburton Oil Well Co., 4 W.H. Cas. 751;

Walling v. Dunbar Transfer etc. Co., 3 W.H. Cas. 284.

In *Skidmore v. Swift*, 323 U.S. 134, the Court said at page 136:

"We hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment

involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court."

See also,

Armour & Co. v. Wantock, 323 U.S. 126; 89 L. Ed. 118;

Bicanic v. J. C. Campbell Co., 5 W. H. Cas. 364;

Walling v. Bank of Waynesboro, 5 W. H. Cas. 467.

In *Steiner v. Mitchell*, 215 F. 2d 171, the Court said that the only question for determination was whether the activities of the employees "... are so closely related to the duties which they are employed to perform as to constitute an integral part thereof and should be classed as 'principal' rather than 'preliminary' and 'postliminary' activities. . . ."

The Fair Labor Standards Act was passed for the same general purpose as the National Labor Relations Act, and we can see no reason why the Labor Board is justified in attempting to apply a different meaning to the terms "work", "worked", or "hours of work", than the courts use in construing the Fair Labor Standards Act.

3. *The burden of proof and the finality of the findings of the Labor Board's decision.*

In a proceeding to enforce an order of the Board when the Board appears before a statutory Court, it appears as a mere litigant and must establish its right to the relief for which it prays, and it is within the Court's province to determine whether the findings of

the Board are supported by evidence, and whether the order is appropriate under the statute.

NLRB v. Ford Motor Co., 119 F. 2d 326.

The findings of the Board with respect to questions of fact must be supported by substantial evidence.

29 U.S.C.A., Sec. 160(f) ;

NLRB v. Haddock Engrs., Ltd., 215 F. 2d 734;

NLRB v. D. Gottlieb & Co., 208 F. 2d 682.

In *Miller & Lux v. Industrial Accident Comm.*, 178 Pac. 960, the Court held that where the ultimate finding of the commission that an injured employee was within the operation of the statute allowing compensation was based on probative facts found by it which failed to establish the ultimate facts found, the Court could annul the finding.

See

Cook v. Massey, 220 Pac. 1088;

Calif. Employment Comm. v. Bowden, 126 P. 2 972.

4. *The Clinton Foods case and the Waialua case.*

The Board held that the *Clinton Foods* case is not applicable, but that the general work of Banez was more like that of the "semi-drivers" in that case, and was not like that of the "flat drivers" who hauled fruit directly from the company's groves to the plant. The Board stated that Olaa's truck drivers were engaged exclusively in hauling sugar cane from the roadside of the Company's fields to its plant, and that therefore their work is more like that of the semi-drivers who, instead of hauling directly from the fields, hauled from the *roadside* to the plant. The Board found that the

semi-drivers were industrial employees "in accord with the desires of the parties." It would seem that the Board considered that the roadside in that case was the concentration point. The Board does not state whether the roadside was company property within its fields, or whether this was a public road system, but it found that the "goat drivers" hauled the fruit from the groves to the roadside in vehicles. In the present case the truck drivers haul from the fields directly to the plant and move along the field roads to pick up the 1½ ton bundles. However, the Board was not sure that Olaa's drivers were not like the flat drivers, and it proceeded to discuss on pages 80-81 of the record, certain factors, including length of drive, and its contention that Olaa's drivers did nothing except stand around during loading and slash off protruding cane sticks, and it purported to bolster its position by arguing that the situs of the truck drivers was at the mill.

The decision in the *Clinton Foods* case uses the following language with respect to the goat flat drivers:

"These drivers spend approximately two-thirds of their time when working in company-owned groves . . . hauling fruit directly from the groves to the plant in flats."

It seems to us that the words "hauling fruit directly from the groves to the plant" indicate the work which the goat flat drivers did in the fields. There is, so far as we can gather from the decision, no suggestion that they did any cultivating or harvesting. The Board noted that these drivers spent "a substantial part of their time on the farm property, and that the opera-

tion was conducted by and for the benefit of the employer who admittedly is engaged in a farming operation." The Board does note the distance between the groves and the plant as a contributing factor, but as we have already stated, we cannot see why a distance of three miles, if the haul is over public roads, is material. If a truck driver is not engaged in agriculture while driving 12 or 23 miles over a public road, he is not more so engaged when driving three miles over a public road, and apparently a road that did not run through any of Clinton's groves.

It is to be noted that Acting Chairman Rodgers dissented from the Board's decision in the *Olaa* case on the ground that its decision in the *Clinton Foods* case was controlling (R. 93-95). A dissent by a member of a tribunal from the decision of the majority is a matter that the Appellate Court may take into consideration in determining the correctness of the decision of the majority. (*Wyman-Gordon Co. v. NLRB*, 153 F. 2d 480, 483).

In the *Waialua* case the Court was not ruling that transportation of laborers and equipment to the field, in addition to transporting the cane from the fields to the mill, was a necessary prerequisite to the agricultural exemption. The Court said:

"We cannot hold that merely because *Waialua* uses a method ordinarily not associated with agriculture—a railroad—to transport the cane from the fields to the mill, it has forfeited its agricultural exemption. Where a farmer thus uses extraordinary methods, we must look to the function

performed. Certainly no one would argue that the agriculture exemption would not apply to farm laborers who took the cane to the plant in wheelbarrows. . . .”

The Court also stated:

“Furthermore, had Waialua not owned the mill, its transportation activities *from field to mill* would come squarely within the agricultural exemption . . . We do not believe the Congress intended to deprive farmers having their own mills of the exemption it offered to farmers who do not.”

The Court then continued:

“Similarly, the exemption clearly covers the transportation of farm implements, supplies and field workers to and from the fields. . . .”

In other words, the Court held that not only was the transportation of cane from field to mill an agricultural operation, but also and independently, that the transportation of the implements and field laborers to and from the fields was a necessary part of the agricultural enterprise.

We believe the dissenting opinion of the Acting Chairman of the Board correctly analyzes the *Waialua* case.

It is further to be noted that the Board in the present case refused to consider the use of Olaa’s private roads “by the drivers for the sole purpose of transporting the cane from the roadside to the plant as work actually performed on a farm, where the general practice is then to drive the trucks over the public highways to the plant, and the drivers spend 60 percent or more of

their driving time on the public highways." We fail to see the logic of this reasoning.

VI

THE DECISION BY THE BOARD IN THE PRESENT CASE IS IN CONFLICT WITH ITS EARLIER DECISIONS

The Board's decisions in the past in the case of an employee engaged part time in covered operations and part time in noncovered operations have been so much at variance with each other that it is impossible to tell today on what limb the Board will alight in a given case. This is especially true in cases where the Board has passed upon the composition of a proper bargaining unit.

The following cases are illustrative.

In *Eastern Sugar Associates*, 99 NLRB 809 (1952), the Board held that employees who were engaged in repairing trucks and building and repairing carts for hauling sugar cane from the fields to the railroad sidings were agricultural employees, although they did not work on a farm, since the equipment on which they worked was used by the employer solely for farming operations. The Board emphasized the fact that these employees were classed by the employer in its agricultural division, as distinguished from mill operators who were classed by the Company in its operating division.

In *Antle Carrots, Inc.*, 110 NLRB 741 (1954), the employer was engaged in crating and packing carrots grown on lands of independent planters. The Board

found that its packing shed employees were not agricultural laborers, but the duties of one employee were to repair machinery in case of a breakdown in the shed, on the road, or in the field, using a pickup truck to make repairs on the road or in the field. The Board said:

"The record does not disclose what percentage of the maintenance man's working time is spent in repairing farm machinery in the field."

and continued,

"The Board has held that field maintenance men, because they repair agricultural machines on farms, are engaged in work incidental to farming operations. More recently, the Board considered whether individuals who divide their working hours between agricultural and nonagricultural duties should be regarded as falling within the statutory exclusion of agricultural labor, and decided that they must be excluded from units of employees covered by the Act. Accordingly, we shall exclude the maintenance mechanic from the union herein found appropriate." (Citing the Clinton Foods case)

In the determination of a unit appropriate for collective bargaining, the Board has held that a unit of all the service stations of the employer was appropriate although some of the units were located 90 miles from the city where the principal office and a great number of stations were located.

Super-Test Oil Co., 97 NLRB No. 116 (unreported).

Also, the Board has held that the employees of a company engaged in woods operations and portable

millwork operations located 40 to 50 miles from a lumber company's sawmill and other operations, and log truck drivers who carry logs from the woods to the sawmill, were properly included in an employer-wide production and maintenance unit in favor of the integration of the operations and common working conditions.

See,

Townsend Sash, Door & Lumber Co., 96 NLRB 950.

In *L. Maxcy, Inc.*, 78 NLRB 525, the Board was unable to determine what percentage of their time the "goat truck" drivers spent in hauling fruit (grown by the company and also by independent growers) from the orchards to the roadside, and what part they spent in hauling directly from the orchards directly to the plant. The evidence was in conflict on this point. The Board said:

"The Board has held that the functions of goat-truck drivers in hauling fruit from the orchard to the roadside is within the agricultural exemption, and requires that employees thus engaged be excluded from the benefits of the Act. On the other hand, the Board has held that the transportation of agricultural products from farm to processing plant is not covered by the agricultural exemption. . . . Accordingly, all employees dividing their time between agricultural employment and nonagricultural employment are deemed to be within the unit herein found appropriate. . . ."

In *Sampsel Time Control, Inc.*, 80 NLRB 1250 (1948), certain employees washed windows, cleaned walls, and did other types of maintenance work, in addition "to making hourly tours of the plant as part

of their security duties." The Board termed them "janitor-watchmen." The decision does not indicate the nature of their security duties. The Board stated:

"... According to the testimony at the hearing, they divide their time equally between maintenance work and plant security functions. . . . As they do not spend more than 50 percent of their working time as watchmen, they will be regarded as maintenance employees, and will be included in the unit."

In *Steelweld Equipment Company, Inc.*, 76 NLRB 831 (1948), the Board stated:

"It appears that three maintenance employees at the plant combine with their maintenance duties service as night watchmen. The record is not entirely clear as to what proportion of their time is spent in such service. If they spend *more than* 50 percent of their *working time* as night watchmen, we will consider that they are 'employed as a guard' within the meaning of Section 9(b)(3) of the amended Act, and they will be excluded from the unit; otherwise, they will be regarded as maintenance employees and will be included." (Italics added)

In *United States Gypsum Company*, 81 NLRB 344 (1949), the Board stated:

"Watchman: The record discloses that the watchman spends equal amounts of time in maintenance and plant-protection functions. As he does not spend *more than* 50 percent of his time as a watchman, we shall include him, as a maintenance employee, in the unit." (Italics added)

In the *Walterboro Manufacturing Corporation* case, 106 NLRB 1383 (1953), the Board stated that:

“It is the nature of the duties of guards and not the percentage of time which they spend in such duties which is and should be controlling.”

However, in *Queen City Furniture Company, Inc.*, 87 NLRB 634 (1949), the Board ruled that two men designated as watchmen by their employer, who operated production machines, fired the boilers and cleaned the plant, and who spent “a few moments out of each hour in making the rounds of the plant as watchmen” should be included in the bargaining unit as production or maintenance employees.

Similarly, in *Indiana Desk Company, Inc.*, 82 NLRB 103 (1949), the Board included in the bargaining unit as maintenance and production employees, watchmen who spent 15 to 20 minutes out of each hour in making rounds about the plant, and who spent the rest of their time in the boiler room keeping the fire going in the boiler.

In *Northern Redwood Lumber Company*, 88 NLRB 272 (1950), the Board held that watchmen who made hourly tours should be excluded from the bargaining unit, but that a janitor who acted as a watchman for one 8-hour shift, the rest of the week being spent in janitorial duties, should not be classed as a guard, the Board stating:

“As the janitor spends the greater part of his time doing maintenance work, we find that he is not a guard within the meaning of the Act.”

See to the same effect, *Carolina Metal Products, Inc.*, 76 NLRB 644 (1948).

In *Wiley Mfg. Inc.*, 92 NLRB 40 (1950), the Board held that two firemen-watchmen who spent about 40 percent of their time as watchmen and the remainder of their time as firemen, and that a third employee who spent *half* his time in each capacity, should be included in the unit of production and maintenance employees. The Board said:

“As none of these three employees spend(s) *more than* 50 percent of his time as a guard, we shall include them.”

In *Hershey Estates*, 112 NLRB 1300 (1955), the Board said:

“The Board has recently held that employees who divide their time between agricultural and nonagricultural activities, spending a *substantial part of their time* in performing agricultural duties, will be considered ‘agricultural laborers’ and excluded from units of employees covered by the Act.”

The footnote, p. 1302, shows that the Board was referring to the *Clinton Foods* case. So far as we can ascertain from the *Hershey Estates* case, the Board did not attempt to determine the percentage of time spent in agricultural and nonagricultural labor.

We have been unable to find many pertinent decisions directly involving agriculture, aside from those discussed in the *Waialua* decisions in 178 F. 2d 603; 216 F. 2d 466, and 349 U.S. 254, but it seems to us that

the decisions involving such employees as watchmen, guards, etc., cited above, are applicable.

The Board does not mention the case of *Pepeekeo Sugar Co.*, 59 NLRB 1532, decided in 1945. In that case the Board, while holding that many kinds of work are definitely classed as agricultural, said:

“ . . . some of the employees divide their time between agricultural and non-agricultural pursuits. While all of such employees may be represented by the successful union in respect to that part of their employment which is not agricultural, *only those employees* who spend 50 percent or more of their time in such non-agricultural employment have a sufficiently substantial interest in the terms and conditions of employment to entitle them to vote in the election. . . .” (pp. 1544-1545)

This decision was rendered before the passage of the restrictive appropriation acts. It may, however, account for the Board's emphasis on what it considered to be the relative use of the private and public roads in the present case.

The Board states that the part time rule in the *Clin-ton Foods* case, 108 NLRB 85, also decided by it prior to the controlling appropriation acts, is not applicable (R. 79-80). The Acting Chairman believed it is applicable. He stated that in that case the Board had held that:

“ . . . Employees who divide their time between agricultural and nonagricultural employment, spending a *substantial* part of their time in per-

forming agricultural duties, will be deemed 'agricultural laborers'." (R. 95) (*Italics added*)

That this is correct is clear from the Board's statement at the bottom of page 87 and the top of page 88 concerning some of its earlier decisions where less than one-half the employee's time was spent in a noncovered activity.

1 CCH LRR, Sec. 1670.06, cites the *Clinton Foods* case in support of the following statement:

"Workers who divide their time between agricultural and non-agricultural labor are within the exemption if they spend a substantial part of their time—such as one-third—in agricultural labor."

The exclusion of agricultural workers under the Fair Labor Standards Act is very broad, and the provisions in the Act are to be liberally construed.

Waialua Agric. Co. v. Maneja, 178 F. 2d 603, 608; 216 F. 2d 466, 470.

We can see no reason why the "exemption" should be given one construction in a labor dispute, or in determining the proper unit for collective bargaining, and a different one in connection with the jurisdiction of the Labor Board.

The Board throughout its decision has based its opinion on portions of the evidence only; has in every possible instance construed the implications of the evidence as strongly against Olaa as it could; has placed upon Olaa the burden of proof in all details of the case, and we respectfully submit that its decision is not substan-

tiated by either the evidence or the law, and that a decree enforcing the order of the Board should not issue.

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PROOF OF SERVICE

I, ARTHUR G. SMITH of SMITH, WILD, BEEBE & CADES, attorneys for Olaa Sugar Company, Limited, do hereby certify that I caused to be mailed, postage thereon fully prepaid, registered, return receipt requested, through the United States Air Mails,

Twenty copies of the foregoing Answering Brief of Olaa Sugar Company, Limited, Respondent-Appellant, to:

Paul P. O'Brien, Esq.,
Clerk, U.S. Court of Appeals, 9th Circuit,
P. O. Box 547,
San Francisco 1, California.

Three copies thereof to:

General Counsel,
National Labor Relations Board,
Washington 25, D.C.

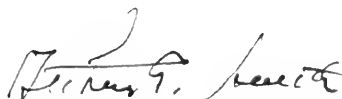
One copy thereof to:

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Said copies were deposited in the Post Office at Honolulu, Hawaii, on the 18th day of December, 1956.



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No. 15143

**In the United States Court of Appeals
for the Ninth Court**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142
RESPONDENTS**

***ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD***

ANSWERING BRIEF FOR RESPONDENT ILWU LOCAL 142

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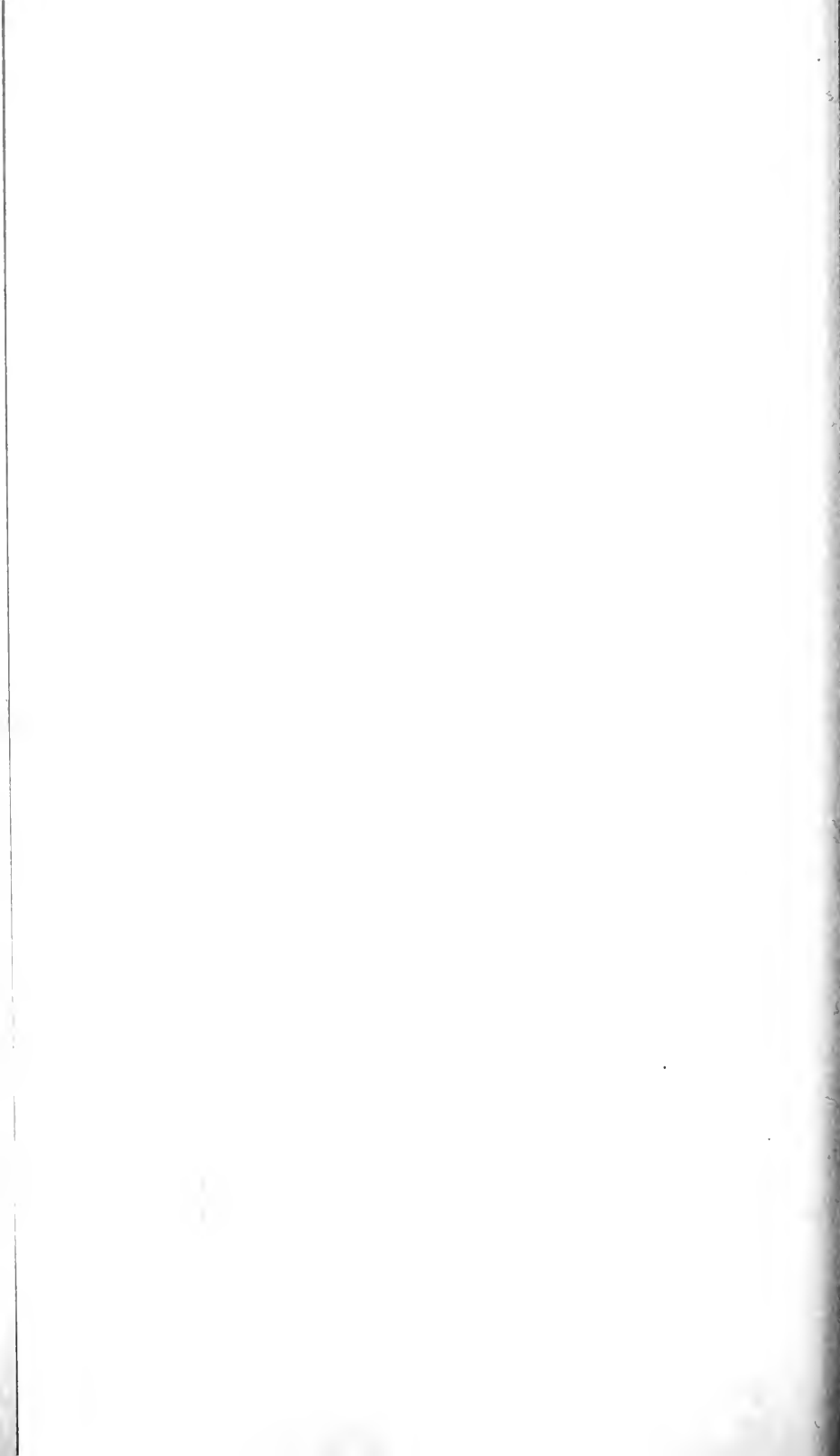
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Statutes:

Fair Labor Standards Act, 29 U.S.C. 203 (f) :	
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**In the United States Court of Appeals
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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**OLAA SUGAR COMPANY, LTD. AND ILWU LOCAL 142
RESPONDENTS**

***ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD***

Answering Brief for Respondent ILWU Local 142

JURISDICTION

Respondent union concurs in petitioner's statement of Jurisdiction (Petr. Br. 1) but submits this in turn depends on the question of whether or not Banez, the charging employee herein, is an agricultural laborer under Section 2 (3) of the National Labor Relations Act, as amended.

STATEMENT OF THE CASE

Respondent union generally concurs in petitioner's statement of the case (Petr. Br. 2-13) as a substantially accurate summarization of the same, except as respondent notes to the contrary hereinafter.

SUMMARY OF ARGUMENT

I. The collective bargaining agreement neither on its face nor as applied was illegal or discriminatory. The evidence on the record as a whole fails to substantially show that respondent union unlawfully caused the discharge of Banez.

II. Banez was exempt as an agricultural laborer under Section 2 (3) of the National Labor Relations Act, as amended. He was such under both Section 3 (f) of the Fair Labor Standards Act as made applicable to the National Labor Relations Act through the Board Appropriation Acts and under controlling Board decisions.

ARGUMENT

A. The Unfair Labor Practices.

1. *Section 1, Paragraph 8 of the Collective Bargaining Agreement.*

Petitioner sets out the language of Section 1, Paragraph 8 of the contract on page 7 of its Brief. The contention is that this language is discriminatory *per se* (Petr. Br. 15-16). The section says that any *claim* of the Union that a non-union employee is disrupting harmonious working relations *may* be taken up as a grievance; repeated disruption of this sort shall be *grounds* for discipline or discharge. Respondent union submits this amounts to no more than the right to present a grievance in the hope of correcting and ameliorating a disruptive situation—should the Company feel the claim to be justifiable. In the case of repeated disruptive practices, the conduct (or misconduct) is grounds for discipline or discharge—if and only if the Company deems such action warranted. In short a dis-

cretion is lodged in the Company to reject the claim in its entirety or, if it feels some action is justified, to "discipline" (which may take the form of anything from a reprimand to action short of discharge) or discharge the employee. Consequently it is difficult to see how the Company is *required* to take disciplinary action, willy nilly. (See Petr. Br. 15-16). It is submitted petitioner has misconstrued the contract section in this regard, and that it is not discriminatory *per se*.

2. Discharge of Banez.

Petitioner contends the discharge of Banez was brought about because of his want of union membership and his exercise of rights under the Act, rather than for activities unprotected by the Act (Petr. Br. 17-24).

To understand the setting and background against which events leading to the discharge were staged it is necessary to view the plantation's plan to convert from hand to mechanical cutting of cane, which involved a lay-off of about 50% of the plantation's employees. (R. 235). The largest group to be affected was the field work force, 75% of whom were Filipinos. Petitioner sets out the situation in its Brief, correctly indicating that the controversy, or potential controversy, was the feeling on the part of some that in retention of employment the Japanese were being favored over the Filipinos on racial rather than legitimate grounds; and the Union contended that in this situation Banez was active in fanning the flames of racial animosity. (See Petr. Br. 7-11)

A union entering into a collective bargaining agreement with an employer assumes certain obligations and duties, not only to the employer, but also to the employees and

union membership. Disruption of harmonious working relations on the job is a matter of concern to the union, as it is to the employer, and the responsibility for terminating such disruption is as much the union's as it is the employer's. It need hardly be said that disruption of the type here attributed to Banez, if it involved not the merits or non-merits of union activity but the stirring up of racial antagonisms, against the background of a threatened wild-cat strike in violation of the contract (See Section 15 of the contract, General Counsel's Exhibit 14), is not protected activity under the Act, nor is the prevention of such disruption an unfair labor practice.

Respondent union submits that neither as written nor as applied did the contract clause in question violate the Act and that on the entire record the Board should have found the discharge legal and non-discriminatory. See, for instance, *NLRB v. Edinburg Citrus Ass'n.*, 147 F.2d 353 (C.A. 5) where racial antipathies and bad feeling between two employees and the rest of the employees leading to disturbance and violence justified the discharges despite a strong background in that case of union activity.

Misconduct that interferes with the job, with production, and with harmonious employee relations is proper cause for discharge. In the instant case this was present and there was no question of any attempt by the Union to procure the discharge of Banez under an invalid union-security clause—the usual situation.

B. Banez Is Exempt As An Agricultural Laborer

1. The Issue Involved

Petitioner refers to Section 2(3) of the Act which

exempts from coverage "any individual employed as an agricultural laborer" and to the Board's annual appropriation riders relating the definition of agricultural laborers to agriculture as defined in Section 3 (f) of the Fair Labor Standards Act; and petitioner states the issue here is whether Banez was within the exemption provided by that Act. The "two branches" of the definition are then referred to and petitioner attempts to demonstrate that Banez' work falls within neither. (Petr. Br. 24-25)

2. *The "Two Branches" of Section 3(f)*

The "first branch" is referred to in *Farmers Reservoir & Irrigation Co. v McComb*, 337 U.S. 755 at 762 as follows: "First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying etc., are listed as being included in this primary meaning." It need hardly be added that "harvesting" is one of the specifications included in this primary meaning. One question then is whether Banez, a truck driver hauling freshly cut cane from the field to the mill participates in "harvesting."

As to the "second branch" the *Farmers Reservoir* case, *supra*, 337 U.S. at 762, 763, states: "Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." The Supreme Court then goes on to say, with respect to the case then before it: "Dealing with these two branches of the definition it is clear, first, that the occupation in which the petitioner's employees are engaged is not farming. The

company owns no farms and raises no crops.”

In *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, the Court, in dealing with the exemption as defined in Section 3 (f) of the FLSA stated at 260 that the exemption was meant to embrace the whole field of agriculture, and sponsors of the legislation so stated. In reference to the railroad workers who performed in that case substantially the same functions as the cane truck drivers in this case the Court said, at 260:

Waialua's railroad workers not only haul cane from the fields to the processing plant but also transport farming implements and field laborers on the narrow-gauge railway extending throughout the plantation. For numerous reasons, we feel that these employees fall within the comprehensive wording of the agriculture exemption. Nowhere in the Act was any attempt made to draw a distinction between large and small farms or between mechanized and nonmechanized agriculture. In fact, the very opposite appears, since Congress in 1949 specifically refused to draw a distinction between large and small farms similar to the distinctions drawn in the size of newspapers or telephone companies. See HR Rep No. 267, 81st Cong, 1st Sess, p. 24, Compare FLSA, as amended, §§ 13 (a) (8), 13 (a) (11), 13 (a) (15).

In view of this, we cannot hold that merely because Waialua uses a method ordinarily not associated with agriculture—a railroad—to transport the cane from the fields to the mill, it has forfeited its agriculture exemption. Where a farmer thus uses extraordinary methods, we must look to the function performed. Certainly no one would argue that the agriculture exemption did not apply to farm laborers who took the cane to

the plant in wheelbarrows. There is no reason to construe the FLSA so as to discourage modernization in performing this same function.

Furthermore, had Waialua not owned a mill, its transportation activities from field to mill would come squarely within the agriculture exemptions covering "delivery to storage or to market or to carriers for transportation to market." We do not believe the Congress intended to deprive farmers having their own mills of the exemption it afforded farmers who do not. In the debate on the amendment extending exemption to "delivery to market," its sponsor made clear that auxiliary activity of the kind here involved would be included within that term. 81 Cong Rec 7888.

The Court found the cases of *Bowie v. Gonzalez*, 117 F.2d 11 (C.A. 1), and *Calaf v. Gonzalez*, 127 F.2d 934 (C.A. 1), inapposite, going on to say that Waialua's transportation system was all either in or contiguous to its fields, save the mill trackage. It then stated:

. . . The railroad is used exclusively for the effectuation of the agricultural function of transporting exempt agricultural workers to the fields, together with their equipment and supplies, and hauling freshly cut cane to the processing plant. Without it or some other "haul," the land could not be cultivated and the cane, after harvest, would spoil in the fields and be lost. We believe that under the facts here presented the administrative practice also requires that the railroad employees be classified as within the agriculture exemption.

It is submitted that the fact that workers and their equipment were hauled to the fields in that case and not in this

is immaterial.

In *Waialua* it must be remembered that there were two classes of "transportation" workers. The first operated the railroad cars on the portable tracks in, over and near the fields, taking the freshly cut cane to the company's main-line railroad, which ran throughout the plantation. From there skilled railroad workers transported the cane to the mill. It is apparent that it was this latter group which the Supreme Court was discussing in its opinion. See *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 at 257 and the same case below, *Waialua Agricultural Co. v. Maneja*, 216 F.2d 466 (C.A. 9) at 471. In the instant case it is apparent that the same operation has been to an extent merged, so to speak, as far as the cane trucks are concerned. These latter are loaded in the private field roads and then proceed along the same, within the confines of the fields either directly to the mill, or then onto private roads to the mill, or then onto public roads to the mill. (R. 161-168, 180-186). In view of the statement in *Waialua, supra*, 349 U.S. at 257, that freshly cut cane is extremely perishable and must be processed within a few days of harvesting or serious spoilage will result, and in view of the evidence in the record on this score in the instant case, it can properly be said that the truck drivers who receive the cane at the fieldside and then take it as expeditiously as possible to the mill are participants in the "harvesting" operation.

In *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398 (C.A. 9), this Court had under consideration an FLSA case involving the agricultural exemption and stated the facts, at page 400, as follows:

. . . The office, plant and equipment of defendant are located somewhat more than a mile beyond the city

limits of Holtville, California, and not on a farm. Defendant owns no farms and operates none. It purchases from farmers growing crops of alfalfa within a radius of one-half to eighteen miles of its plant. Defendant at the proper stage harvests the crop upon the various farms through its employees, including plaintiffs, by an integral operation wherein the alfalfa is mowed, raked into windrows, picked up and chopped and loaded into a truck for immediate transportation to the mills. There it is processed and placed on the market.

And at page 402 the Court said:

There cannot be much doubt but that this entire process is harvesting. The trial court did not expressly so find, however, but did find the employees engaged in the process were employed in agriculture, which is, of course, sufficient. There can be no distinction drawn between a harvesting operation and an activity incident thereto, since Congress, as above noted, included both in the broad definition of "agriculture." The failure of the trial court to specify under which branch of the definition the harvesting activities here fall is without importance. The Briefs which attempt to make a point of this failure emphasize a distinction without a difference.

Some difficulty arises with regard to the truck drivers inasmuch as they are employed in the integrated harvesting operation which has been above described. The trial court said with reference to them:

"The work of these employees, while on the alfalfa fields, has been described. Upon arrival at the mill with a full load, the drivers back up their truck to a self-feeder or leave it in the yard for others to handle.

They then drive their trucks back to the fields as soon as empty vehicles are available."

It is obvious that the truck driver does not do any handling of the product at the mill, but simply returns to the field with another truck.

The Court then stated that the theory upon which the lower court held the truck drivers were not engaged in agriculture was not entirely clear; that express findings should be made as to spoilage of the newly cut alfalfa that might render it not an agricultural product in its raw or natural state. The Court then went on to state, at 403:

Transportation of crops so that spoilage can be prevented is usually considered part of harvesting. The operation was one which was integrated with the harvesting and occurred "on a farm." Part of the journey to the mill took place off the farm, and of course, was not performed by a farmer. It must be remembered, however, that the statute includes as agriculture "preparation for market, delivery to storage or to market or to carriers for transportation to market." 29 U.S.C.A. § 203.

The case was remanded for further findings and judgment thereon.

From the foregoing it would appear the cane truck drivers in the instant case were engaged in harvesting operations or, at the very least, in an activity incident thereto.

Petitioner cites *Chapman v. Durkin*, 214 F.2d 360 (C.A. 5), cert. den. 348 U.S. 897, in support of the proposition that transportation of crops from field to mill is not exempt at all, or if exempt is such pursuant to the "second branch,"

that is, if performed by a farmer or on a farm. The *Chapman* case is interesting because the employer there was neither a farmer nor a producer in agriculture. His business was colloquially known as a "bird dog" operation, that is, he purchased fruit unfit for packing and sale in its original state and sold it to canning factories. Some of the fruit he purchased while on the trees (which fruit had been left on the trees by the producers as unfit), some fruit he obtained as culls from packing plants, and the rest he purchased from small operators who delivered the fruit to his place of business.

The Court said, in rejecting the employer's claim of exemption for the tractor-trailer drivers, at 214 F.2d 360:

Undoubtedly a wider latitude should be accorded to a fruit grower engaged in this type of agriculture, whose employees, in consummation of the operations of producing, hauled the fruit either to bins on farms or to the market for sale. See *Chester C. Fosgate Co. v. U.S.*, 5 Cir., 125 F.2d 775; *Lake Region Packing Ass'n v. U.S.*, 5 Cir., 146 F.2d 157; *N.L.R.B. v. Edinburg Citrus Ass'n*, 5 Cir., 147 F.2d 353; and *N.L.R.B. v. John W. Campbell, Inc.*, 5 Cir., 159 F.2d 184.

But here, said the Court, at 363:

The work of gathering the fruit and loading it into trailers at the groves in the present case was done, of course, on the farm, as an essential part of producing for the market, and clearly fell within the express terms of the Act; but the hauling from the farm by appellant who was not a farmer or producer in agriculture, as required by the law, cannot be said to be work "performed by a farmer or on a farm***" under the above quoted definition of agriculture.

The quoted definition referred to is from the *Farmers Reservoir* case, *supra*, 337 U.S. 755, at 762-764.

The fact-situation in *Chapman* is clearly different from that in this case. Olaa is a farmer and as to its own fields the cutting, loading and hauling of cane from its fields to the mill appears to be indisputably a continuous and integrated harvesting operation. As to the planters' fields, the cane trucks enter into and upon these fields, via private field roads, are there loaded, and then leave by said roads. If the truck drivers are participants in "harvesting" while on the field roads, to that extent at least they are exempt under the "primary branch," whether the field is that of Olaa or a planter. Certainly while in the fields of planters they are "on a farm" and the nature of their entire hauls from field to mill place them within the "second branch." As far as hauling from the fields of Olaa to the mill is concerned, it is submitted the truck drivers are "harvesting," or at the very least, as already noted, are engaged in performing practices "by a farmer . . . as an incident to or in conjunction with such farming operations . . ."

Petitioner in seeking to show Banez is not exempt under the provisions of the "second branch" contends that driving on public highways is not work "on a farm" and that since approximately 60% of his driving time was spent on public highways (in addition to the time spent at the mill) the exemption does not apply. (Petr. Br. 27-28) The *Chapman* case, 214 F.2d at 363, is cited in support of this proposition. But in the *Chapman* case, as already noted, the employer was neither a farmer nor a producer in agriculture; he resembled a "dealer or distributor of the product of others." 214 F.2d at 361. Petitioner also cites *Farmers Reservoir*, 337 U.S. at 767. But there, after referring to the legisla-

tive history, the Court was careful to point out that it was clear that the work of the company's employees was done neither on a farm nor by farmers. The function of supplying water to the farms had been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers were forbidden to interfere. 337 U.S. at 768.

The difficulty petitioner has on this point stems from its insistence on viewing the truck drivers' activities here as incidental to milling rather than to farming. If hauling Olaa's own freshly cut cane from the fields to the mill for first processing is included in "farming in all its branches" and is an integral part of "harvesting"; and if as to the independent planters' cane the hauling of the same is intimately bound up with the harvesting of the cane "on a farm" and as such is a "practice . . . performed . . . on a farm as an incident to or in conjunction with such farming operations," then Banez is an agricultural laborer. In this connection it is respectfully submitted that in the phrase "as an incident to or in conjunction with such farming operations," "such farming operations" refers to "farming in all its branches" appearing in the first portion of Section 3 (f).

Respondent union takes issue with the Board's finding that the trucking operation is carried on as an incident to, or in conjunction with, its plant operations, rather than its farming operations. (Petr. Br. 29) The record indicates to the contrary and Olaa's operation is in line with "the function performed" test of the *Waiialua* case. (See e.g. R. 155-158, the Harvesting Superintendent's description of *harvesting*, which concludes with the truck being unloaded by a crane at the mill.) The Board noted (R. 81) the Com-

pany's transportation system is considered by the Company as a part of its harvesting department. In this connection see Company's Exhibit 4, its table of organization which shows "Cane Transportation" as a function coterminous with "Hand Harvesting" and "Mechanical Harvesting," and all three under the jurisdiction of the Harvesting Superintendent who in turn is a subordinate of the Field Superintendent. However, the Board notes that the Truck Dispatcher supervises the work of the drivers from the plant which therefore became another indication to the Board that Olaa's trucking operation was carried on as an incident to, or in conjunction with, its plant rather than farming operations. (R. 81) But it is clear the Dispatcher was a part of the Harvesting Department and under the supervision of the Harvesting Superintendent; there is certainly no evidence he was a part of or in any way connected organically with the mill crew. His operations (dispatching) were integrated with the loading foreman in the field via radio-telephone (R. 166).

It is submitted that Banez was engaged in harvesting or work incidental thereto or in conjunction therewith and that he was employed on a farm and by a farmer.

3. *Board Decisions*

In *Clinton Foods, Inc.*, 108 NLRB 85, the employer was engaged in the growing and processing of citrus products. The employer had three types of truck drivers in its employ: "goat drivers" who carried fruit from the groves to the roadside in vehicles known as "goats"; "semi-drivers" who hauled the fruit in semi-trailers from the roadside to the processing plant; and "goat-flat drivers" who operated "goats" or "flats." These last spent about two-thirds of

their time hauling fruit directly from the groves to the plant in "flats." This was done however only when operations were within a radius of two or three miles from the plant; at greater distances the flat drivers only carried fruit from the groves to the roadside. They spent one-third of their time at this latter operation—which the Board held was clearly agricultural. With respect to the flat-drivers' hauling from the groves to the plant, the Board stated said drivers spent a substantial part of their time on the employer's farm property and noted the farming operation was conducted by and for the employer's benefit. In view of these circumstances, especially the fact that the groves were quite near the processing plant, the Board stated: "We are of the opinion that the driving of the flats with fruit from the groves to the plant is directly related to the marketing of such fruit by the grower thereof. Such operation is, therefore, 'a practice performed by a farmer . . . as an incident to or in conjunction with, such farming operations. Because the 'flat drivers' here involved perform only agricultural functions, we find that they are 'agricultural laborers' who are specifically excluded from the Act and must therefore be excluded from the unit."

But the Board found another basis for its conclusion. Having found that these particular drivers spent at least one-third of their time driving their trucks "on the farm" which constituted a completely agricultural function, reference was then made to the situation where employees spent only one-fourth of their time working as guards (a statutorily exempt classification) and had been deemed excluded from coverage although the rest of their time was in an included category. *Walterboro Mfg. Co.*, 106 NLRB No. 241. Reference was also made to the situation where

an employee spent a part of his time as a supervisor (also statutorily exempt), the rest of his time in covered employment, and was therefore likewise excluded from coverage under the Act. *Hampton Roads Broadcasting Corp.*, 100 NLRB 238. The Board concluded its opinion in the *Clinton case* by stating that even assuming *arguendo* that the truck drivers concerned were partly engaged in non-agricultural work, to the extent that they spent a substantial part of their time in an agricultural function, they must be deemed agricultural laborers within the meaning of the Act and therefore must be excluded. To the extent they were inconsistent, past Board cases holding that truck drivers dividing their time between agricultural and non-agricultural employment were deemed to be within the appropriate unit, were overruled.

The *Clinton* decision was followed in *Hershey Estates*, 112 NLRB 1300, where employees dividing their time between agricultural and non-agricultural duties, spending a substantial part of their time in agricultural duties, were excluded under the agricultural exemption.

In *Yamada Transfer*, 115 NLRB No. 210 (1956), the employer was engaged in hauling general freight; selling and delivering rock; and renting heavy equipment, such as bulldozers, tractors and dump trucks in and around Hilo, Hawaii. Different classifications of employees were involved and the employer, Yamada Transfer, contended that some of them were exempt under Section 2 (3) of the National Labor Relations Act, as amended. With respect to these employees the Board held as follows:

Bulldozer-Tractor Operators: The Employer employs 13 bulldozer-tractor operators. These employees operate bulldozers and tractors which have been

leased to the Olaa Sugar Company and to various independent sugar plantation owners. Their function is to reshape cane land, clear virgin land, plow, harrow, cut lines and cover seeds. The work is performed on plantation lands 8 to 20 miles from the company's offices. The equipment is furnished to the plantation owners by the Employer as needed on an hourly basis. These employees are supervised by the Employer's tractor supervisor and are not interchanged with any other workers.

It is apparent that the bulldozer-tractor operators are performing labors within the meaning of Section 3 (f) of the Fair Labor Standards Act. The Employer testified that the work being performed by the bulldozer-tractor operators on the plantations would be completed within 2 or 3 months after the hearing and that there will then be no further need for this service. As the hearing was held on February 15, 1956, it is possible that all or some of the bulldozer-tractor operators are no longer performing the work which we have found constitutes them agricultural laborers. Accordingly, we shall exclude from the unit as agricultural laborers only those bulldozer-tractor operators who, on the eligibility date, are performing agricultural labor.

Dump Truck Operators: The Company employs 12 dump truck operators. At the time of the hearing, three drivers were operating dump trucks leased to plantation owners. The other 9 were engaged in hauling rocks from the Employer's quarry to various sugar plantations, which the plantations use for road building purposes, and to a few private parties. The rocks are unloaded either at the job site or at stockpiles on the plantations. The drivers in this latter group are supervised by the Employer's tractor superintendent.

The drivers working under the lease arrangement carry waste materials to the plantation dumps and haul gravel for the road builders. Although they are immediately supervised by plantation agents, the sole authority to hire, fire, and discipline remains vested in the primary employer. The two groups of drivers are interchanged freely. None of the drivers does any of the actual loading or unloading of the trucks.

In determining whether a particular type of work is agricultural, the Board has said that, "the ultimate test is whether the services of the employees involved are in connection with a mercantile enterprise or an agricultural operation." The Employer herein is engaged in work of a commercial character. Consequently the dump truck drivers' work that relates to the Employer's commercial activities, delivering rocks to the plantations from the Employer's rock pit, is not primarily agricultural or incidental to agricultural operations, and insofar as this work is concerned these employees are not agricultural laborers.

However, while working under the lease arrangement they are at all times employed within the plantation boundaries. The work so performed appears necessary to the proper functioning and maintenance of the plantations. The drivers are directed by plantation foreman and the job they perform is duplicated by plantation employees. We find that the dump truck drivers while working for plantation owners on a rental basis are performing agricultural work.

The Employer alleges that 25 percent of its dump truck work is leased out. At one time or another, all of the dump truck drivers work on the rental basis. However, there is no evidence to show the proportion of time spent by each driver on the rental operations.

In *Clinton Foods, Inc.*, the Board decided that individuals who divide their time between agricultural and nonagricultural pursuits must be deemed agricultural employees. In the instant situation, one-quarter of the dump truck drivers' total operations are performed while working for plantation owners on plantation land. Accordingly, we shall exclude the dump truck drivers from the unit.

Shovel Operators: There are two employees in this category. One works at the various plantation stockpiles and the other is stationed at the Employer's rock pit. They are not interchanged. The stockpiles are necessitated by the fact that some of the trucks, hauling rocks to the plantations, are too large to take into the muddy plantation fields. The plantation shovel operator loads smaller field trucks from these stockpiles. This employee spends approximately 5 to 10 hours a week performing repair work at the company garage. Both of these employees work under the same supervision as the dump truck drivers. There is no evidence that these employees load plantation owned trucks or Employer's trucks leased to the plantations.

It is clear that the shovel operators' duties are inseparably connected with the delivery of the Employer's rocks and not with the operation of the plantations. We find that they are not agricultural employees and we shall include them in the unit.

It is interesting to note that at least one of the plantations involved was Olaa Sugar Company, and that this decision was subsequent to the Board's decision in the instant case.

Petitioner denies that the drivers in the instant case can be compared to the "flat drivers" in *Clinton* on a variety of grounds (Petr. Br. 33). First it is contended that since

drivers such as Banez haul came from the *roadside* to the plant, they are more like the semi-drivers in *Clinton*. This ignores the situation in this case where the private roads are within the cane fields and form a network so that the trucks can go into the fields to be loaded. In a very real sense the case here is analagous to trucks going into fruit groves for loading and actual functions rather than semantics should be controlling. In any event it cannot be denied that the private field roads are located upon and within a farm. Next, says petitioner, even if the cane truck drivers here are more nearly like the *Clinton* flat drivers the distance in miles from the plant is much greater in the former than the latter (Petr. Br. 33). No distinction in either the NLRA or the FLSA was made between large and small farms. See the *Waialua* case, *supra*, 349 U.S. 254, 261; *NLRB v. John W. Campbell, Inc.*, 159 Fed 184, 187 (C.A. 5). But even so, it is apparent that much of the hauling is from within a few miles of the mill.

Furthermore, says petitioner, the flat drivers in *Clinton* hauled fruit "from the groves" and thus spent some of their time "in the actual growing area" (Petr. Br. 33). In contrast, petitioner argues, the cane truck drivers here perform no work in the fields; they park the trucks on the roadside. Again the fundamental misconception of the nature, character and function of the private network of dirt roads through the fields, placed there for the express purpose of facilitating harvesting, is evident. Finally, petitioner points out that the cane truck drivers spend about half their time hauling cane of independent planters, and thus the entire trucking operation, as in the *Calaf* case, *supra*, is an incident to milling rather than farming. But if the *Clinton* case has any vitality it is then still apparent that a substantial por-

tion of the cane truck drivers' time is spent on or in the farmlands of either Olaa or those of the planters, and to that extent require an application to them of the exemption.

CONCLUSION

It is respectfully submitted that for the reasons stated respondent union committed no unfair labor practices and that in any event the National Labor Relations Board was without jurisdiction herein by reason of the exempt status of the charging employee. Accordingly the petition for enforcement of the Board's order should be dismissed.

Dated at Honolulu, Hawaii

this 3rd day of December, 1956

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

Switchmen's Union of North America, General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America, and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

-vs-

Southern Pacific Company, a Corporation, and Brotherhood of Railroad Trainmen, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division

**BRIEF OF APPELLANTS, SWITCHMEN'S UNION OF
NORTH AMERICA, ET AL.**

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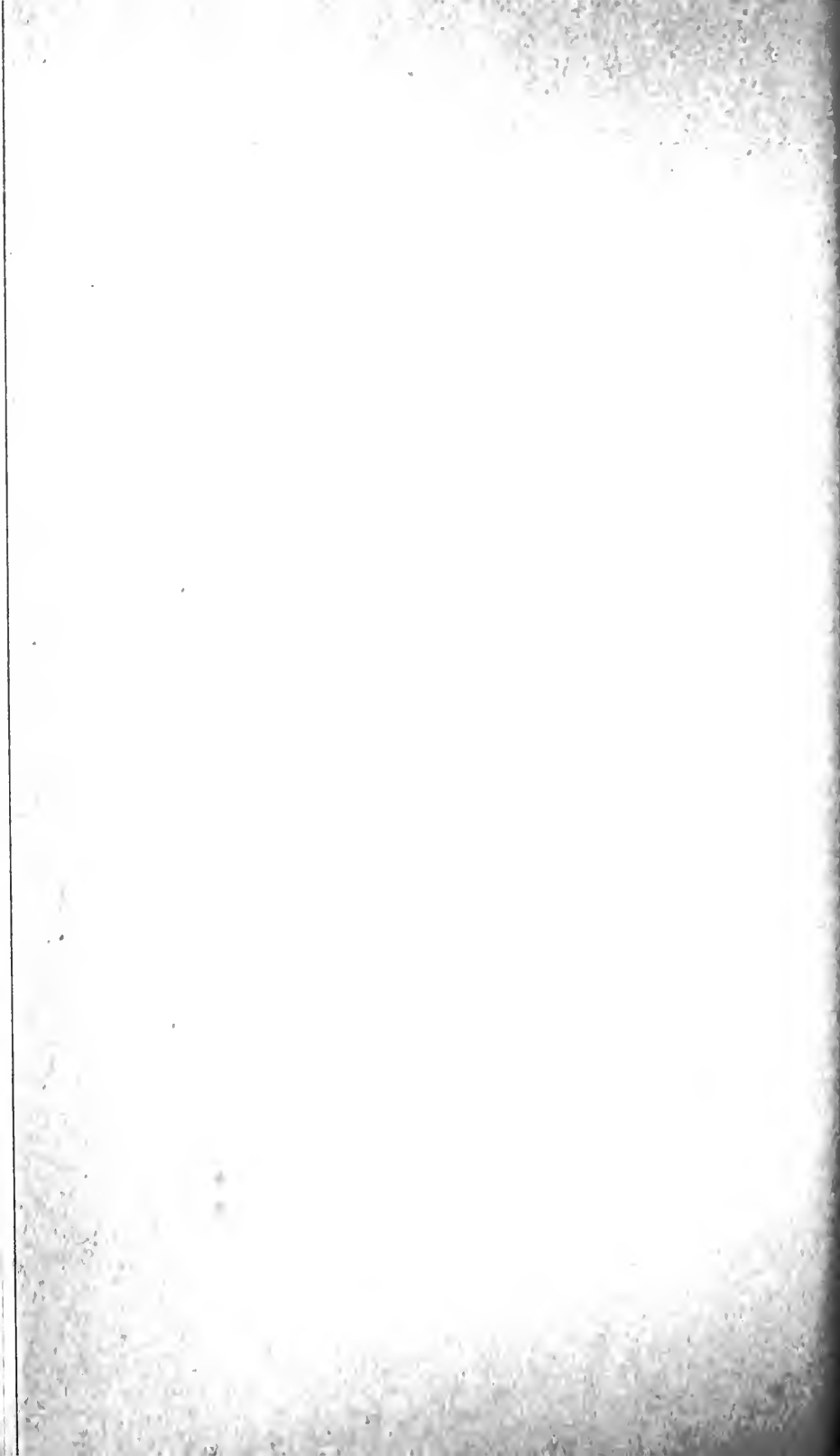
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Appellants,

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Appellees.

**BRIEF OF APPELLANTS, SWITCHMEN'S UNION OF
NORTH AMERICA, ET AL.**

JURISDICTION

DISTRICT COURT

The jurisdiction of the district court in this case rests upon 28 U.S.C. 1332, 1337, 2201. The plaintiff, Southern Pacific Company, hereinafter called the carrier, is a corporation organized and existing under the laws of the State of Delaware (Tr 4, 42). The defendants are all residents and citizens of states other than Delaware (Tr. 4-5, 43). The amount in controversy,

exclusive of interests and costs, exceeds \$3,000.00. The case therefore is within the jurisdiction of the district court as a case involving diversity of citizenship and the requisite jurisdictional amount, 28 U.S.C. 1332 (Tr 43).

As alleged in the complaint (Tr 6-8) filed herein by the carrier, admitted in the answer (Tr 24-25) filed by the defendant Brotherhood of Railroad Trainmen, hereinafter called the B.R.T., further amplified by the answer and counterclaim (Tr 19-22) filed by the defendant counterclaimant Switchmen's Union of North America, AFL-CIO, hereinafter called the S.U.N.A., and found by the court (Tr 42-45), the parties were engaged in a controversy as to the validity under the Railway Labor Act, as amended, 45 U.S.C. 151 *et seq.*, of provisions in two collective bargaining agreements entered into between the carrier and the B.R.T. which provided for the checking off of dues in favor of the B.R.T. from wages of yardmen employed in a class or craft for which the S.U.N.A. had been certified by the National Mediation Board as the exclusive bargaining representative. Since the Railway Labor Act is an Act of Congress regulating commerce, the action is within the jurisdiction of the district court as a suit arising under an Act of Commerce regulating commerce within the meaning of 28 U.S.C. 1337 (Tr 43)¹.

¹*Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 1944, 323 U.S. 210, 213; *Primakow v. Railway Express Agency*, D.C. Wis., 1941, 57 F. Supp. 933, 934; *Air Line Dispatchers Ass'n. v. National Mediation Board*, App D.C., 1951, 189 F. 2d 685, 689, certiorari denied, 342 U.S. 849.

The existence of an actual controversy among the parties with respect to the validity under the Railway Labor Act of the carrier's conduct in checking off dues in favor of the B.R.T. from the wages of persons represented by the S.U.N.A. conferred jurisdiction on the district court to declare the rights of the parties under the Federal Declaratory Judgment Act, 28 U.S.C. 2201 (Tr 43)².

COURT OF APPEALS

The United States District Court for the Northern District of California, Southern Division, on March 29, 1956, entered its judgment in favor of the carrier and the B.R.T. and against the S.U.N.A., declaring that "the 'Dues Deduction Agreements', subject of this action, are wholly valid and enforceable and in accordance with the terms of the Railway Labor Act" (Tr 46-47). The S.U.N.A. filed its notice of appeal on April 16, 1956 (Tr 48). This court has jurisdiction of this appeal by virtue of 28 U.S.C. 1291.

²*American Federation of Labor v. Western Union Telegraph Co.*, 6 Cir., 1950, 179 F. 2d 535, 538; *Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas Co.*, 6 Cir., 1949, 177 F. 2d 942, 944; *Consolidated Gas Utilities Corp. v. Keener Oil & Gas Co.*, D.C. Okla., 1950, 94 F. Supp. 689, 693, affirmed, 10 Cir., 1951, 190 F. 2d 985, 989.

STATEMENT OF THE CASE

The S.U.N.A. has at all times material hereto been the exclusive collective bargaining representative of the craft or class of yardmen employed by the carrier. The status of S.U.N.A. as such representative had been established by certificates issued in November, 1950, and again on October 18, 1954, by the National Mediation Board acting pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth. In both instances the certificates were issued as a result of elections conducted by the National Mediation Board in which the majority of the employees in the craft or class of yardmen voted to select the S.U.N.A. as the exclusive collective bargaining representative for their craft or class (Tr 4, 17, 27).

Despite the foregoing certification of the S.U.N.A., the carrier, on June 23, 1955, entered into two collective bargaining agreements with the B.R.T. which provided that the carrier would check off and pay over to the B.R.T. "periodic dues, initiation fees, assessments and insurance" from wages of all members of the B.R.T. employed by the carrier "in any of the services or capacities covered in Section (3) First (h) of the Railway Labor Act defining the jurisdictional scope of the First Division, National Railroad Adjustment Board, upon the written and unrevoked authorization of a member" (Tr 6-7, 9-13, 16, 24, 43-44). The section of the Railway Labor Act to which the agreements refer for a description of the classes or crafts covered, namely, Sec-

tion 3, First (h), 45 U.S.C. 153, First (h), confers on the First Division of the National Railroad Adjustment Board jurisdiction over yardmen, the same craft or class for which S.U.N.A. has been certified as the exclusive collective bargaining representative. The pertinent language of Section 3, First (h) of the Railway Labor Act is as follows:

"First division: To have jurisdiction over disputes involving train—and yard—service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen, and yard-service employees."

The carrier and the B.R.T. have construed and applied their above described check-off agreements of June 23, 1955, to the craft or class of yardmen employed by the carrier for whom the S.U.N.A. is the exclusive collecting bargaining representative (Tr 7-8, 16, 20, 26, 27, 36). At all times since the effective date of those agreements the carrier has checked off and paid over to the B.R.T. the dues, initiation fees, assessments and insurance of such of the yardmen as joined or were members of the B.R.T. and authorized such check off (Tr 7-8, 16, 20, 26, 27, 36).

On September 8, 1955, the S.U.N.A. by letter, and on September 28, 1955, officers of the S.U.N.A. in conference with the officials of the carrier, informed the carrier that the S.U.N.A. believed that the above check-off agreements violated Section 2, Fourth of the Railway Labor Act, as amended, insofar as they were applicable to yardmen (Tr 7-8, 16, 21-22, 26, 27, 44). The S.U.N.A. requested the carrier to cease giving ef-

fect to the agreements insofar as they applied to yardmen (Tr 7-8, 16, 21-22, 26, 27, 44). The carrier refused so to do (Tr 8, 16, 22, 26, 27).

In order to resolve the controversy between the carrier, the B.R.T. and the S.U.N.A. with respect to the validity of the above dues check-off agreements between the carrier and the B.R.T. insofar as they applied to yardmen, the carrier filed this suit for declaratory relief (Tr 3-15). Both the B.R.T. and the S.U.N.A. by answer admitted the essential allegations of the complaint (Tr 16-17, 26).

The S.U.N.A. also filed a counterclaim asserting that the above described check-off agreements violate Section 2, Fourth of the Railway Labor Act, as amended, and injure the S.U.N.A. in three respects: (1) by depriving S.U.N.A. of its status as the exclusive collective bargaining representative of all yardmen employed by the carrier; (2) by depriving S.U.N.A. of initiation fees, dues, assessments and insurance of yardmen who are willing and anxious to join the S.U.N.A. but are unwilling to assume the burdens of paying such sums to each of two labor organizations; and (3) by creating division and dissension in the ranks of the craft or class of yardmen for which the S.U.N.A. is the exclusive collective bargaining representative (Tr 17-22). The S.U.N.A. alleged that it has no adequate remedy at law and will suffer irreparable injury unless the courts declare the dues check-off agreements between the carrier and the B.R.T., insofar as they apply to yardmen, to be in violation of Section 2, Fourth of the

Railway Labor Act, as amended, and enjoin the carrier and the B.R.T. from giving any further effect to such agreements insofar as they apply to yardmen or otherwise deducting any sums from the wages of yardmen to be paid over to the B.R.T. (Tr 22). The S.U.N.A. accordingly prayed for such a declaration of rights and injunctive relief (Tr 23).

There being no disputed facts, the carrier, the B.R.T. and the S.U.N.A. all moved for a summary judgment (Tr 29-34). The court at the arguments on the motions for summary judgment, received the evidence of one witness for the B.R.T. (Tr 86-113) and of one witness for the S.U.N.A. (Tr 114-119) both of whom corroborated and amplified upon the allegations in the pleadings. Thereafter, on March 5, 1956, the district court handed down an opinion (Tr 34-42) and on March 29, 1956, entered findings of fact, conclusions of law and judgment declaring the check-off agreements valid (Tr 42-47).

QUESTION INVOLVED

The only question involved in this appeal and the manner in which it is raised are as follows:

Whether under the Railway Labor Act, as amended (45 U.S.C. 151, et seq.), in a situation where the majority of the employees in a craft or class of operating employees have selected a union and the National Mediation Board has certified that union as the exclusive representative of the craft or class, the carrier may validly enter into a collective bargaining agreement with

one or more other unions to check off from their wages and pay over to such other union or unions dues of such of its employees within the craft or class as are members of such other union or unions.

This question is raised by the complaint for declaratory relief (Tr 3-13), the answers thereto (Tr 16-17, 26), the counterclaim filed by the S.U.N.A. (Tr 17-23), the opinion of the court below (Tr 34-42), and the judgment declaring such dues check-off agreements to be valid (Tr 46).

SPECIFICATION OF ERRORS

1. The court below erred in construing Section 2, Eleventh, of the Railway Labor Act, as amended (45 U.S.C. 152 Eleventh) as excepting from Section 2, Fourth, of said Act, dues check-off agreements made with labor organizations other than the one selected by the majority of the employees in the craft or class affected.

2. The court below erred in construing the Railway Labor Act, as amended (45 U.S.C. 151, *et seq.*) as permitting a carrier to contract with a minority union for a checking off of dues from the wages of employees for whom a majority union has been certified by the National Mediation Board as their exclusive bargaining representative.

3. The court below erred in declaring the dues check-off agreements between the carrier and the B.R.T. to be valid, enforceable and in accordance with the terms of the Railway Labor Act.

SUMMARY OF ARGUMENT

The Railway Labor Act, as amended, contains an express and unambiguous ban on all checking off of dues except to the union which has been chosen by the majority of the employess in the craft or class involved as the exclusive representative of that craft or class. Section 2, Fourth, read alone, prohibits all deductions of dues from wages. Section 2, Eleventh, modifies this prohibition to the extent of permitting a valid agreement between a carrier and the labor organization, chosen as the representative of the craft or class, for a dues check off to that labor organization. Since the modification is limited to an agreement with the majority union for a check off in favor of the majority union, all agreements with minority unions and all checking off to minority unions remain prohibited.

The legislative history of the Railway Labor Act shows that the B.R.T. made an unsuccessful effort in Congress to secure the repeal of Section 2, Fourth, at the time Section 2, Eleventh was enacted. The rejection by Congress of the B.R.T.'s proposal to repeal the ban on check offs and its adoption instead of a modification permitting check offs to majority unions only shows clearly that Congress intended that all agreements permitting a checking off to any union other than that chosen by the majority of the employees, should continue to be illegal.

This construction of Section 2, Eleventh of the Railway Labor Act is in accord with the holdings by the Supreme Court of the United States that the Act bars all agreements between carriers and minority unions after a majority union has been chosen.

Strong considerations of practical labor relations support the ban on check-off agreements with minority unions. The status as exclusive collective bargaining representative of the union chosen by the majority of employees in a craft or class is undermined if a carrier may enter into agreements with one or more minority unions applicable to persons within the craft or class. Employers can never rest assured that any collective bargaining agreement fixing terms and conditions for a period of time will give them a period of stability, if at any time one or more new unions may open negotiations for agreements with them applicable to members of the group already covered. Division and dissension within the ranks of the craft or class are given encouragement if minority union check-off agreements are valid. Finally, the financial stability of the bargaining agent for the group, which Congress found a sound basis for permitting check offs to the bargaining agent, is lessened to the extent that members of the craft or class may bind themselves, either before or after entering the craft or class, to dues check-off authorizations to other unions irrevocable for a year.

ARGUMENT

I

The express language of the Railway Labor Act prohibits all checking off of dues except when checked off to the exclusive representative of the class or craft.

Section 2, Fourth, of the Railway Labor Act contains an absolute ban on all checking off from wages of employees of dues. This section is modified by Section 2, Eleventh, to the extent of permitting a checking off of dues in only one instance: where dues are checked off to the union which is the representative of the class or craft. Only the union chosen by a majority of the employees can be the representative of the craft or class. A minority union can never be. Hence, a check off to a minority union is not within the check off permissible under Section 2, Eleventh, and remains illegal under Section 2, Fourth.

Section 2, Fourth, of the Railway Labor Act, as amended, (45 U.S.C. 152, Fourth), insofar as it deals with a check off of dues,³ provides:

“it shall be unlawful for any carrier * * * to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations.”

³The full provisions of Section 2, Fourth, Fifth, Ninth and Eleventh are printed in an Appendix at the end of this brief, pp 35-39, *infra*.

Section 2, Eleventh, of the Railway Labor Act, as amended, (45 U.S.C. 152, Eleventh), excepts certain check-off agreements from the above ban. In this regard the section reads:

“Notwithstanding any other provision of this chapter * * * any carrier or carriers as defined in this chapter and *a labor organization or labor organizations duly designated and authorized to represent employees* in accordance with the requirements of this chapter shall be permitted

* * * *

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and *payment to the labor organization representing the craft or class of such employees*, of any periodic dues, initiation fees, and assessments

* * * *

“(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.” (Emphasis supplied.)

The above quoted provisions of the Railway Labor Act are clear and unambiguous. All check-off agreements and all checking off whether pursuant to the agreement or otherwise are illegal except where the agreement providing for the check off is made with a labor organization “duly designated and authorized to represent employees in accordance with the requirements” of the Railway Labor Act and provides for the payment “to the labor organization representing the craft or class of such employees.” Other provisions of the Railway Labor Act show that only a labor organization selected

by a majority of the employees in the craft or class is "duly designated and authorized to represent employees in accordance with the requirements of the Act" and that only such a labor organization meets the specifications of one "representing the craft or class of such employees".

Thus, Section 2, Fourth, of the Railway Labor Act, as amended (45 U.S.C. 152, Fourth), along with its ban on all check offs, also provides:

"The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

Section 2, Ninth (45 U.S.C. 152, Ninth) provides:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated or authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter."

From this it follows that both the introductory sentence of Section 2, Eleventh, defining the labor organization with which a check-off agreement may validly be made and subparagraph (b) of Section 2, Elev-

enth, defining the labor organization to which checked-off dues may validly be paid, limit the permissible labor organization to one representing the craft or class.

In the instant case, the S.U.N.A. had been chosen by a majority of the employees in the only craft or class involved, namely, the yardmen employed by the carrier, and had been certified by the National Mediation Board as the representative of that craft or class, duly designated and authorized in accordance with the requirements of the Railway Labor Act (Tr 4, 17, 27). Hence, the S.U.N.A. is the exclusive representative of the craft or class of yardmen employed by the carrier. By reason of the permissive language of Section 2, Eleventh, a check-off agreement between S.U.N.A. and the carrier applicable to yardmen and providing for payment of the checked-off dues to the S.U.N.A. could validly be made. All other check-off agreements remain illegal under Section 2, Fourth. The B.R.T. has no status, and claims none, as the representative of the craft or class of yardmen employed by the carrier. The agreement between the B.R.T. and the carrier insofar as it is applicable to the craft or class of yardmen violates the express language of Section 2, Fourth, and does not fall within the exceptions of Section 2, Eleventh.

No other provision of the Railway Labor Act affords any basis for reading into the absolute ban imposed on check offs by Section 2, Fourth, any exceptions other than the one expressly set forth in Section 2, Eleventh. The court below apparently based its decision (Tr 34-42) on two features of the Railway Labor

Act both found in Section 2, Eleventh (c). The first provision in subparagraph (c) upon which the court below relied is by its terms concerned only with union security agreements and not with check-off agreements. The court below however, reasoned that by analogy a similar provision respecting check-off agreements should be implied. This, we submit, is clearly negated by the fact that subparagraph (c) expressly deals with the parallel problem with respect to check offs but not by making the provision which the court below implied. As we shall explain more fully in the next point, the legislative history of subsection (c) compels exactly the opposite conclusion from that drawn by the court below.

Subparagraph (c) of Section 2, Eleventh, with respect to check-off agreements, contains only one express provision, which reads as follows:

“no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages of periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership.”

The court below read this language as authorizing a check-off agreement to any organization in which an employee held membership (Tr 41-42). Such a construction conflicts with the earlier provisions in the section carefully limiting check-off agreements to the bargaining representative of the craft or class and further carefully limiting payments of checked-off dues to such representative of the craft or class. This language in subparagraph (c) means just what it says and no

more; even with respect to agreements for check off with the representative of the craft or class of dues there must be no checking off of dues of any employee in the craft or class who is not a member of the labor organization which is the representative of the craft or class.

No basis exists for going further and saying that whatever labor organization he does belong to may have a check off. To so read the Act is to render completely meaningless the careful limitations spelled out in the introductory sentence to Section 2, Eleventh, and in subparagraph (b) of that section. It likewise renders completely meaningless the retention in the Act of the language of Section 2, Fourth, banning check offs. If Congress had wished to allow dues to be checked off to any labor organization in which an employee held membership it would have repealed the prohibition on such check offs contained in Section 2, Fourth. As we shall show in our subsequent discussion of the legislative history, the B.R.T. proposed to Congress such a repeal but Congress instead retained the ban as fully applicable to all checking off of dues except to the majority union.

With reference to union security agreements, subparagraph (c) of Section 2, Eleventh, does not change the limitation imposed by the introductory sentence of Section 2, Eleventh, that both union security agreements and check-off agreements may be made only with the majority union. It does, however, without permitting the carrier to enter into any agreements with

minority unions, prevent any operating employee of a carrier from being discharged for non-membership in the majority union so long as he shall "hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership" operating employees. This court will recall that it recently had before it a case arising out of this language, but not presenting any issue with respect to the check off. *United Railroad Operating Crafts v. Northern Pacific Ry. Co.*, 208 F. 2d 135, certiorari denied, 347 U.S. 929, Cf. *Pigott v. Detroit, Toledo & Ironton Ry. Co.*, 116 F. Supp. 949, affirmed CA 6, 1955, 221 F. 2d 736, certiorari denied, 350 U.S. 833, and cases cited in those opinions.

There is nothing in the union security provision of the Railway Labor Act, as amended, which either expressly or by implication suggests that each national labor organization may make check-off agreements applicable to any craft or class in which any of its members may be employed. Members of minority unions may hold and retain their membership in minority unions by voluntarily paying dues to such minority unions. There is no reason that minority unions should in addition have the right to a check off.

Minority unions are expressly protected against having their members' dues checked off to the majority union when they are not members of it. This express provision dealing with the check-off problem in this context discloses the Congressional intent to make only this provision respecting the check-off problem as applied to members of minority unions.

It negatives any intention to go further and imply, as the court below did (Tr 39-42), that since employees could remain members of a minority union so long as it was national in scope, without the necessity of joining the majority union to retain their jobs, they could also have their dues checked off to a minority union. Not only does the very different provision defining their protection from a check off to the majority union negative any implication that they were to have even greater check off rights in derogation of the majority union, but the express ban on all check offs which was retained in Section 2, Fourth, and limited only by the permissive language of Section 2, Eleventh (b) where the check off is to a majority union, would be completely inconsistent with such an implication. The decision of the court below flies squarely in the face of the express ban of Section 2, Fourth. If the court below is correct, the ban on check offs contained in Section 2, Fourth, is read out of the Act.

While the court below does not appear in its opinion to have relied upon the fact that the dues check-off agreements between the S.U.N.A. and the carrier could be read as providing for a dues check off of members of S.U.N.A. who are employed in a craft or class of trainmen or brakemen for which the B.R.T. is the majority union, the court below does mention this feature of the S.U.N.A.'s agreements, both in its opinion (Tr 36) and in its findings of fact (Tr 44). The evidence discloses that when the S.U.N.A. proposed a check-off agreement to the carrier, the carrier suggested the use of the same

form of agreement already in existence between the carrier and the B.R.T. (Tr 99-100; 115). The S.U.N.A. acquiesced without realizing the effect and meaning of the disputed provision (Tr 115-116). Its agreement has never been applied to checking off of any dues other than in the craft or class of yardmen for which the S.U.N.A. is the majority union (Tr 116). As soon as S.U.N.A. realized the effect of this provision it offered to abrogate it and has informed the carrier that S.U.N.A. regards it as illegal and wishes to repudiate and set it aside (Tr 52, 57, 116). In these circumstances the presence of the identical provision in the S.U.N.A. agreements can afford no basis for construing the Railway Labor Act as permitting check-off agreements with a minority union.

II

The legislative history of Section 2, Eleventh of the Railway Labor Act shows that Congress considered and rejected proposals which would have permitted checking off of dues to unions other than the exclusive representative of the craft or class.

Section 2, Fourth of the Railway Labor Act, as amended in 1934, prohibited all checking off of dues to any labor organization. Its language so indicates (see p. 11, *supra*) and it has so been construed in the only case in which the issue arose. *Association of Rock Island Mechanical and Power Plant Employees v. Lowden*, D.C. Kan., 1936, 15 F. Supp. 176, affirmed, *Brotherhood of Railroad Shop Crafts of America v. Lowden*,

86 F. 2d 458, 108 A.L.R. 1128, certiorari denied, 300 U.S. 659.

In 1951, Congress adopted Section 2, Eleventh, which expressly modifies Section 2, Fourth, to permit checking off of dues to the extent set forth. During the hearings before Congressional committees which preceded the enactment in 1951 of Section 2, Eleventh of the Railway Labor Act, as amended, the Brotherhood of Railroad Trainmen, the same organization whose agreement with the carrier is under attack in this suit, urged upon Congress both the complete repeal of the ban on check-off agreements contained in Section 2, Fourth, and also the inclusion of express provisions permitting a check off to a minority union under such circumstances as are present in the instant case.

The bills upon which the hearings were held in Congress preceding the enactment of Section 2, Eleventh, were S. 3295, 81st Cong., 2nd Sess. and H.R. 7789, 81st Cong., 2nd Sess. As introduced in Congress these bills contained provisions similar to those ultimately enacted in that they each limited the labor organization with which a check-off agreement could validly be made and to which checked-off dues could validly be paid by a carrier, to the labor organization representing the craft or class.⁴ The B.R.T. appeared by its legislative

⁴S. 3295, as introduced, is printed in Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295, p. 1, H.R. 7789 is printed in Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789, p. 1.

representative, Mr. Harry See, at the hearings held before the Senate and the House Committees considering the bills and opposed the enactment of the bills as introduced on various grounds, one of which was that the provisions proposed would, if enacted, prevent the checking off of dues to the B.R.T. in instances where it was not the representative of the craft or class in which some of its members were employed. Mr. See even mentioned by name the S.U.N.A. as a union which sometimes represented the craft or class in which members of the B.R.T. were employed and urged that provisions permitting a check off to the B.R.T. in such circumstances should be adopted in lieu of the proposed bills. In this respect, Mr. See said:⁵

"The check-off provisions of Senate 3295 are found in subparagraph (b) thereof. The Brotherhood of Railroad Trainmen objects to this proposal for the reason that it is wholly lacking in that same flexibility which is essential in its application to the craft situation which exists among railroad operating groups of employees. Furthermore, it leaves in the Railway Labor Act language specifically forbidding the check-off of union dues.

"Furthermore, the Brotherhood of Railroad Trainmen believes that where two or more crafts are closely related and the same employees hold employment rights in more than one of them that the individual should have the right to authorize the carrier to check off his dues in favor of the organization of his choice so long as that organization is the duly recognized and authorized representative of one of said railroad crafts; and that therefore the check-off should be predicated upon individual authorizations by the employee.

* * * *

⁵Senate Hearings, *op. cit.*, pp. 69-70, 73; cf. House Hearings, *op. cit.*, pp. 33-34.

"If our proposal to amend the Railway Labor Act to permit the union shops should be adopted we will find members of the Order of Railway Conductors, or members of the Switchmen's Union, that would be employed under the Brotherhood of Railroad Trainmen agreements on the railroad, the conductors would have the contract for the conductors, and our organization would have the contracts for brakemen. A man might be promoted and be running a train maybe 3 or 4 months of the year, and the other 7 or 8 months of the year working as a brakeman, and if he would be required to pay dues into the union during the 2 or 3 months, or maybe 2 or 3 weeks out of the year that he was employed as a conductor, it would be unfair to him and to us.

"The same thing would be true if he had joined the conductors because he was working part-time as a conductor, and came back to work as a brakeman and he was required to pay dues into the trainmen, even though he held membership in the conductors. It would be unfair to him and to the conductors."

The above arguments of the B.R.T. appear in essence to be directed against employees facing a situation of relinquishing membership in the union of their choice or paying dues to two unions. The only unfairness cited is the payment of dues to two unions. Congress remedied this by providing in subparagraph (c) of Section 2, Eleventh, that dues could not be checked off except to the organization in which the employee held membership. However, Mr. See's proposals went further. On behalf of the B.R.T. he demanded a complete repeal of the ban on checking off of dues contained in Section 2, Fourth. Senate Hearings, *op cit.*, pp. 69-70; House Hearings, *op. cit.*, pp. 32-33. The other unions

avored retaining the prohibition of Section 2, Fourth. Mr. George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, A.F.L., who testified as the representative of the Railway Labor Executives Association, composed of 21 standard railway labor organizations supporting the bills, explained why Section 2, Fourth, should be retained, as follows (House Hearings, *op. cit.*, p. 248):

"The bill before you modifies the present language only to the extent that the union shop and deduction of dues may be negotiated solely by agreement between the carrier and the designated collective bargaining representative of a class or craft. *The carrier would still be barred from deducting dues* or entering into a union shop agreement *with an individual, minority group*, or union which does not hold the collective bargaining agreement. That is why we want to leave paragraphs fourth and fifth of section 2 in there and stop that kind of action as the present law does. At the same time we want to make it possible for the designated agents of the bargaining union and the employer to make a satisfactory agreement." (Emphasis supplied.)

Senator Hill, who was in charge of the bill in the Senate, introduced into the debates in Congress a similar explanation by Mr. Harrison of the reasons for retaining the ban on check offs contained in Section 2, Fourth. Mr. Harrison's explanation as it appears in the Congressional Record (96 Cong. Rec. 16264) reads as follows:

"The bill before you modifies the present language only to the extent that the union shop and deduction of dues may be negotiated solely by agree-

ment between the carrier and the designated collective-bargaining representative of a craft or class. *The carrier would still be barred from deducting dues or entering into a union-shop agreement with any individual, minority union, or union which does not hold a collective bargaining agreement.*" (Emphasis supplied.)

The court below ignored both the plain language of the Act and this legislative history when it held that since the abuse which had given rise to the ban of check offs in 1934, namely check offs to company dominated unions, no longer existed, any check off to a union in which an employee held membership, even though a minority union, was valid (Tr 41-42). This legislative history on the contrary shows that the ban on all check offs except to a majority union was expressly retained in order that check offs to minority unions would remain illegal.

In addition to urging the outright repeal of all language in the Railway Labor Act which prohibited check offs, the B.R.T. also proposed to each the Senate and the House Committee an amendment which would specifically permit a check off to a minority union where its members were sometimes employed in a craft or class for which it was a majority union and by reason of such employment had rights to employment in another craft or class for which their union was not the majority choice. The B.R.T.'s proposed amendment read as follows:⁶

⁶Senate Hearings, *op. cit.*, p. 69; House Hearings, *op. cit.*, pp. 32-33.

"Notwithstanding any other provision of law any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act may make agreements providing, upon individual authorizations, for the deduction from the wages of its or their employees in a craft or class to whom membership is available upon the same terms and conditions as are generally applicable to any other member and pay to the labor organization representing such craft or class of such employees, any dues, fees, assessments, insurance premiums or contributions which may be payable to such labor organization, *provided that when two or more such crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee or promotions from one of such crafts or classes to another are had all such sums shall be deducted and paid over which are payable to the organization of the employee's choice, which is the duly designated and authorized representative of any of such crafts or classes.*" (Emphasis supplied.)

Mr. Harrison, speaking on behalf of the proponents of the bills as introduced, stated that they intended all checking off of dues to the majority union representing the craft or class to cease when an employee was promoted out of that class or craft. Thus Mr. Harrison stated (House Hearings, *op. cit.*, pp 250, 251; Senate Hearings, pp 40, 41):

"It has also been prophesied that great difficulties will arise in the promotion of men who belong to a union and who are paying dues by means of a check-off. If a man is promoted to another craft, his dues would then, under the provisions of this bill, be paid to the organization representing that craft. * * *

"The further argument that the promotion of men would be handicapped by the check-off is equally lacking in validity. When an employee is promoted to an official position and out of a class or craft represented by a labor organization, the deduction of his dues under the provisions of this bill would necessarily cease."

Congress did not adopt either the amendment proposed by the B.R.T. or the bills originally sponsored by Mr. Harrison on behalf of the Railway Labor Executives Association. As we have already pointed out, subparagraph (c) of Section 2, Eleventh, as enacted, prevents any employee from having his dues checked off to any union in which he does not hold membership. As a further protection to employees, the Congress likewise inserted a provision in Section 2, Eleventh (b), which limits the check off to employees who have in writing authorized their dues to be checked off. Such written authorizations are expressly made by the statute revocable after one year. It is thus apparent that Congress adopted a compromise position.

Congress did not go as far as the original bills sponsored by Mr. Harrison appearing on behalf of the Railway Labor Executives Association which would have allowed the majority union to have dues of every employee in the craft or class checked off to it, irrespective of the employee's membership in that organization or wishes, whether a member or not. Nor did Congress go as far to the other direction as Mr. See, appearing in behalf of the B.R.T., who would have allowed minority unions to have their members' dues checked off

from wages earned by their members when employed in a craft or class of which another union was the majority choice. Instead Congress limited a check off to members of the majority union when working in the craft or class represented by their union and even then only when such members gave their written consent to the check off and the employer and majority union had entered into a collective bargaining agreement providing for such check off. Congress thus left employees free to remain members of a union other than the majority choice but made their continued payment of dues in any minority union dependent upon their voluntary act of paying.

The objective of Section 2, Eleventh, as repeatedly expressed in the Congressional hearings and debates preceding its enactment was to increase the financial stability of the union chosen by the majority and to reduce the dissension and unrest which results when a minority of the employees in the craft or class are not members of the union representing them. Mr. Harrison testified:⁷

"All of our unions have what we call a certain number of 'no bills', nonmembers, free riders, and that is the group we are after here.

* * * *

"A no bill, in railroad terminology is applied to a shipment that is travelling without revenue, in other words, it is a free rider. * * *

* * * *

"Activities of labor organizations resulting in the procurement of employee benefits are costly, and

⁷Senate Hearings, *op. cit.*, pp. 6, 15-16.

the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of these activities without contributing anything to the cost. * * *

* * * *

"It is axiomatic that union members resent having to work side by side with 'free riders' who are enjoying benefits procured by the money, time and effort of union employees, and who at the same time are apt to be critical of union policies."

To the same effect, see House Hearings, *op. cit.*, pp 10, 50; 96 Cong. Rec. 17051, 17057.

Similarly, see the following statement of Congressman Wolverton (96 Cong. Rec. 17050):

"To me it seems simple justice to expect, and, if necessary, require all employees who stand to benefit from collective bargaining to belong to the union that acts for them, and in their behalf. Otherwise, employees who do not belong to the union share equally with those who do belong, the same benefits, and, without assuming any of the responsibilities incident to membership."

Congressman Linehan stated (96 Cong. Rec. 17058):

"This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst — the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved."

While Congress was willing to write certain exceptions into the requirement that every employee in the

craft or class must be a member of and pay dues to the majority union, it left these exceptions at a minimum. For the courts to go further and give minority unions such encouragement as a check off would be to ignore the scheme and purpose of Section 2, Eleventh. Few arrangements could be more conducive to dissension from the majority union than a valid check off to a minority union. In view of the literal language of the statute making such a check off illegal, coupled with the legislative history showing Congressional rejection of proposals to legalize check offs to a minority union, it must be held that the Railway Labor Act renders such check offs illegal.

III

The uniform judicial construction of the Railway Labor Act as forbidding carriers from treating with minority unions after a majority union has been established as the representative of a craft or class requires that the Act be construed as barring check-off agreements with minority unions.

It has been uniformly held that a carrier violates its duty to bargain collectively with the union chosen by a majority of the employees in a craft or class whenever the carrier enters into any agreement with a minority union with respect to employees working in the represented craft or class.

In *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 549, the Supreme Court of the United States so held in affirming a decree which en-

joined the carrier from entering into any agreement with anyone other than the union selected by the majority of the employees in the craft or class. The Supreme Court stated:

"The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees, as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through representatives of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other. We think, as the Government concedes in its brief,⁶ that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent collective bargaining with anyone purporting to represent employees, other than respondent, who has been ascertained to be their true representative.

The Supreme Court in other cases has commented that the Railway Labor Act prohibits bargaining with anyone other than the representative chosen by the majority. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44; *Medo Photo Supply Corp. v. N.L.R.B.*, 321

⁶(Note 35a). 'The Government interprets the negative obligations imposed by the statute and decree as having the following effect:

" 'When the majority of a craft or class has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a collective contract (i.e.), a contract which sets rates of pay, rules or working conditions), whether the contract covers the class as a whole or a part thereof."

U.S. 678, 683-684. Cf *Order of Railroad Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347; *J. I. Case v. N.L.R.B.*, 321 U.S. 332, 338-339.

The check off is an appropriate subject for collective bargaining. *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 1953, 205 F 2d 131, 136. Hence agreements with respect to a check off are collective bargaining agreements and can only be made with the exclusive collective bargaining representative.

IV

Sound labor relations policy supports a construction of the Railway Labor Act which prevents check-off agreements with minority unions.

Not only the literal language of the Railway Labor Act and its legislative history support the view that check-off agreements with minority unions are prohibited in the railway industry but in addition numerous practical considerations require the same result.

Under the decision below there is no limit on the number of minority unions which may bargain with a carrier for check-off agreements applicable to their members. Since it has always been held that only the majority union could bargain with a carrier, we have no precedents to sanction strikes by a minority. But if collective bargaining between a carrier and a minority union over a check-off is legal, it might well follow that the minority union's members could strike in support of their union's demand. A strike threat by a majority union in support of a check off demand is legal. It was

threat of a strike for such a demand which preceded the creation of the President's Emergency Board No. 98 under Executive Order No. 10306, which, by its report of February 14, 1952 (N.M.B. Case No. A-3744), recommended to the 390 carriers there involved that they enter into check-off agreements of the type therein set forth (Report, pp 1-3, 52-56, 65-68, 69).

And even if a minority union could not properly strike for such a demand, carriers might be faced with all sorts of harassment if they resisted legal demands for a check off. Employers could never rest assured that any collective bargaining agreement fixing terms and conditions of employment for a period of time would give them a period of stability, if there is no limit on the right of minority unions to demand check-off agreements.

The status of the union selected by the majority of the employees would be seriously impaired by any construction of the Railway Labor Act which accords minority unions rights to bargain for a check off. No longer could it be truly regarded as the exclusive collective bargaining representative of the craft or class. Instead one or more other unions could at any time appear as a representative of their members to demand check-off privileges. To this extent the standing and prestige of the union chosen by the majority would be lessened.

Furthermore, competition over securing check-off authorization from employees could create division and dissension within the craft. Unrest and continual uncer-

tainty over the status of the majority union would result. A certification by the National Mediation Board would no longer serve as the only official count of employees supporting the majority union. From day to day unions could dispute each other's status on the basis of their comparative number of dues check-off authorizations.

The decision below also has the effect of permitting employees, even before they enter the craft or class, to bind themselves irrevocably for a year to have their dues checked off to another union. If after entering the new craft or class they are impressed with the ability and worthwhile character of the union representing them, they will be unable to contribute to its support until their previous check-off authorizations expire, unless they can afford to pay double dues. And employees within the craft or class, in a moment of disagreement with their bargaining representative, may commit themselves irrevocably for a year to have dues checked off to another union. Obviously, the financial stability of the official bargaining agent for the craft or class will be lessened to the extent that employees in that craft or class may bind themselves, either before or after entering the craft or class, to dues check-off authorizations to other unions, irrevocable for a year. But it was the financial stability of the majority union which Congress desired to encourage in the interests of stable and responsible labor-management relationships.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this court should reverse the judgment below and remand with directions to enter a judgment in favor of the defendants-counterclaimants, S.U.N.A. and its components and officers, and against the plaintiff-counterdefendant, Southern Pacific Company, and against the defendants-counterdefendants, B.R.T. and its components and officers, declaring and finding that the check-off agreements between the carrier and the B.R.T. to the extent that they are applicable to yardmen employees of the carrier are invalid and in violation of Section 2, Fourth, of the Railway Labor Act, as amended. The court below should also be directed to enter a decree permanently enjoining the carrier and the B.R.T. from applying any check-off agreement entered into between them to the yardmen employees and from doing any acts which would have the effect of deducting any sums from the wages of yardmen employees to be paid to the B.R.T. or any of its officers or components.

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APPENDIX

The pertinent provisions of the Railway Labor Act, as amended (Act of March 20, 1926, c. 347, 47 Stat 577; Act of June 21, 1934, c. 691, 48 Stat 1186; Act of Jan. 10, 1951, c. 1220, 64 Stat 1238, 45 U.S.C. 151 *et seq*) are as follows:

(These paragraphs are parts of 45 U.S.C. 152)

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from

permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

“Fifth: No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

“Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate

method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

“Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as

are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold

or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.”



No. 15,148

In the
United States Court of Appeals
For the Ninth Circuit

SWITCHMEN'S UNION OF NORTH AMERICA, GENERAL ADJUSTMENT COMMITTEE—SOUTHERN PACIFIC COMPANY, SWITCHMEN'S UNION OF NORTH AMERICA; NEIL T. SPEIRS, as International Vice President, Switchmen's Union of North America, and JOHN R. BURGE as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
and BROTHERHOOD OF RAILROAD TRAINMEN,
et al.,

Appellees.

Brief for Appellee Southern Pacific Company

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SOUTHERN PACIFIC COMPANY, a corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, et al.,

Appellees.

Brief for Appellee Southern Pacific Company

APPELLEE'S STATEMENT OF THE CASE

This is a suit for a declaratory judgment brought pursuant to 28 U.S.C. 1332, 1337 and 2201, for the purpose of

determining a question in actual controversy between appellee Southern Pacific Company (hereinafter referred to as the "Carrier") and the appellant, Switchmen's Union of North America (hereinafter referred to as S.U.N.A.), appellee Brotherhood of Railroad Trainmen (hereinafter referred to as B.R.T.) and others, to-wit, the question of the validity under the Railway Labor Act (45 U.S.C. 152, Eleventh) of two written collective bargaining agreements (identical, except that they apply to two separate portions of the Carrier's system) which became effective August 1, 1955. (R. 9-16) These agreements, which are now and at all times material have been in effect between the Carrier and the B.R.T., provide in effect that the Carrier shall deduct sums for periodic dues, initiation fees, assessments and insurance (not including fines and penalties), payable to the B.R.T. by members thereof from wages earned in the service of the Carrier as trainmen, and as well from "wages earned in any of the services or capacities covered in Section 3, First (h) of the Railway Labor Act defining the jurisdictional scope of the First Division, National Railroad Adjustment Board, upon the written and unrevoked authorization of a member * * *" This arrangement is commonly (and hereinafter) referred to as "Dues Deduction Agreement." (R. 9-16) The Carrier has scrupulously complied with the terms of the Dues Deduction Agreements (R. 7, 36). Appellant S.U.N.A. on September 8 and 28, 1955, demanded that the Carrier cease making such deductions from the pay of members of the B.R.T. employed by the Carrier in the craft or class of yardmen (R.7-8), which craft is represented by S.U.N.A. in accordance with the Railway Labor Act (R. 4, 17). On November 14, 1955, the Carrier filed complaint for declaratory relief in the U.S.

District Court (R. 3-16). Appellant S.U.N.A. and appellee B.R.T. filed answer and counterclaim seeking declaratory relief (R. 16-23; 24-28). The parties moved for summary judgment (R. 29-30; 30-34). On March 29, 1956, United States District Judge Michael J. Roche granted judgment in favor of appellees and declared "that the Dues Deduction Agreements", subject of this action, are wholly valid and enforceable, and in accordance with the terms of the Railway Labor Act (R. 46-47). The S.U.N.A. filed Notice of Appeal on April 16, 1956 (R. 48). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. 1291.

In this state of the case the essential question now before this Court is whether the District Court erred in granting judgment in favor of appellees on the basis of the record setting forth the above agreed facts. More specifically, the question presented by this appeal is as follows :

Are the Dues Deduction Agreements between the Carrier and the B.R.T. lawful and valid notwithstanding that certain members of the B.R.T. who are in the Carrier's employ may be working as yardmen, and as such are subject to the collective bargaining agreement between the Carrier and S.U.N.A. as the collective bargaining representative, under the Railway Labor Act, of the craft of yardmen employed by the Carrier?

ARGUMENT

The facts in this case are not in dispute (R. 29, 32). The sole question before this Court is the legality of the challenged Dues Deduction Agreements between the Carrier and the B.R.T. as applied to B.R.T. members employed as yardmen, which classification is represented by the S.U.N.A.

It is the position of the Carrier that Section 2, Eleventh

(b) of the Railway Labor Act (45 U.S.C. 152, Eleventh (b)), which authorizes the making of dues deduction agreements generally, must be read in conjunction with the next following subsection of Section 2, Eleventh. The latter (Section 2, Eleventh (c) (45 U.S.C. 152, Eleventh (c))) specifically provides that the requirement of membership in a labor organization, under a union shop agreement made pursuant to the act, shall be satisfied, as to employees in engine, train, *yard*, or hostling service, if the employee holds or acquires membership in any one of the labor organizations, national in scope, which are organized in accordance with the act and admit to membership employees of a craft or class in any of the said four services. As applied to the case at bar, Subsection (c) means that the requirements of the union shop agreement between the Carrier and S.U.N.A., covering yardmen employed by the Carrier, can be satisfied, as to any individual yardman, if he maintains membership in B.R.T. In its opinion dated March 5, 1956, the District Court declared in part as follows (R. 39) :

“The record in this case reveals that in the railroad industry men whose principal employment is in one craft, for example, the craft of brakemen, are occasionally, and sometimes frequently employed as members of another craft, for example, as conductors or as yardmen. In view of the interchangeable nature of the employment, it would seem that the only reasonable and workable interpretation of the statutes herein considered is that the union to which said man belongs shall have the right to enter a dues deduction agreement with the carrier, a right which is provided for in all of the contracts shown to the Court, including the contract of the Switchmen’s Union itself.”

In its Findings of Fact dated March 29, 1956, the District Court pointed out (R. 44) :

"4. The Switchmen's Union is itself a party to an identical agreement with plaintiff dated August 8, 1955, effective September 1, 1955. A similar agreement is likewise in effect between plaintiff and its conductors represented by the Order of Railway Conductors and Brakemen."

The position of the S.U.N.A. is, however, that when such an individual is working as yardman or a conductor, he cannot be party to a dues deduction agreement in favor of the union (B.R.T.) of which he is a member, and which holds the representation of the craft (brakemen) in which he regularly works. It is evident that if this view were upheld, the dues deduction provision, instead of affording a measure of protection for an individual employee against the possibility of being in default in his dues and therefore subject to discharge, would engender a false sense of security and might lead to the employee's being in default although he had considered that he was fully protected.

It is contended by the S.U.N.A. that these Dues Deduction Agreements as above applied are prohibited by Section 2, Fourth and Fifth of the Railway Labor Act (45 U.S.C. 152, Fourth and Fifth), notwithstanding the adoption of Section 2, Eleventh (b), (c) and (d) of the Railway Labor Act in 1951 (45 U.S.C. 152, Eleventh (b), (c) and (d)). The said 1951 amendments fully support the validity of these Dues Deduction Agreements. Furthermore, the legislative purpose behind Section 2, Fourth and Fifth was to prevent carriers from interfering with or questioning the right of their employees to organize and bargain collectively. It was directed at such devices as company unions, contributions to union organizations and other such abuses. See Report of the Committee on Labor and Public Welfare in Senate Report No. 2252 (81st Cong., 2d Sess. 4319 (1950)), set forth in part in R. 39-41. This report shows that the

railway organizations have recognized that such abuses have practically disappeared and have sought the right to bargain collectively with regard to union-shop agreements and check-off (another term used for Dues Deduction Agreements), which right is possessed by industry generally (R. 41).

The District Court's opinion adds (R. 41) :

"In conclusion, the Railway Labor Act, Section 2, Eleventh, Subdivision (c) (45 U.S.C.A. Sec. 152, Eleventh (c)) provides that no agreements for deductions from an employee's wages or dues, initiation fees, or assessments are to be made by the carrier payable 'to any labor organization other than that in which he holds membership.' This provision, considered in the light of the over-all legislative intent to give the railroad unions the rights possessed by unions in industry generally, indicates that the employee is not tied as far as payment of dues is concerned to the union holding the contract with the carrier, but rather to the union in which he holds membership."

This conclusion is supported in 2 CCH Labor Law Rep., para. 4600, at page 4784, in the following quotation :

"Employees in occupations falling within the jurisdiction of the First Division of the National Railroad Adjustment Board (engine, train, yard and hostling service) are not required to belong to a union representing a craft or class in which they may be employed if they are members of another union 'national in scope' and admitting members employed in another craft or class. *In such instances, check-off may be granted only in favor of the union in which employees hold membership.*" (Emphasis supplied.)

The Carrier entered into these collective bargaining agreements relating to dues deductions with the conviction

that they were lawful and valid. It is submitted that the judgment of the District Court sustaining this action should be affirmed.

Respectfully submitted,

BURTON MASON

W. A. GREGORY

Attorneys for Appellee

Southern Pacific Company

Dated at San Francisco, California,
September 21, 1956.



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Appellants,

VS.

SOUTHERN PACIFIC COMPANY, a corporation; BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary association; THE GENERAL COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary association; J. J. CORCORAN, as General Chairman, General Committee, Brotherhood of Railroad Trainmen; J. E. TEAGUE, as Secretary, General Committee, Brotherhood of Railroad Trainmen,

Appellees.

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APPELLEES' BRIEF.

JURISDICTION.

The District Court had jurisdiction of this action pursuant to 28 U.S.C.A. Sec. 1332, Sec. 1337, Sec. 2201. Southern Pacific Company, a corporation, plaintiff, is a corporation organized and existing under the laws of Delaware (T.R. 4, 42). The defendants are residents and citizens of states other than Delaware (T.R. 4, 5, 43). Exclusive of interest and costs the

amount in controversy exceeds the sum of \$3,000.00. The case therefore involves diversity of citizenship for a sum in excess of the jurisdictional requirement, 28 U.S.C.A. Sec. 1332 (T.R. 43).

This court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 1291.

QUESTION INVOLVED.

The only issue or question involved in this appeal is clearly stated in the memorandum opinion filed by the District Court, and is:

Whether under the Railway Labor Act, as amended in 1951, (45 U.S.C.A. Sec. 151 et seq.) an agreement was lawfully entered into between the Southern Pacific Company and the Brotherhood of Railroad Trainmen, which agreement provides for the deduction of "periodic dues, initiation fees, assessments and insurances" from the wages of members of the Brotherhood of Railroad Trainmen who are employed by the Southern Pacific Company, notwithstanding the fact that certain of the members of that Union on occasions work as yardmen and are therefore subject to the collective bargaining agreement between Southern Pacific Company and the Switchmen's Union of North America* (T.R. 35). And see opinion, appendix.

*The National Mediation Board has certified the Switchmen's Union of North America, a voluntary association, as the exclusive collective bargaining representative of the craft of yardmen.

SUMMARY OF ARGUMENT.

Throughout the balance of this brief the Brotherhood of Railroad Trainmen will be referred to as B.R.T. and the Switchmen's Union of North America will be referred to as S.U.N.A.

It is the position of the appellees that the agreement between the Southern Pacific Company and B.R.T. which provides for the deduction of periodic dues, initiation fees, assessments and insurance from the wages of employees of the Southern Pacific Company who are members of the B.R.T. is a lawful and valid agreement. That such an agreement is in accord with the proper interpretation of the provisions of the Railway Labor Act (45 U.S.C.A. 151 et seq.) as amended.

Section 2 Eleventh (b) of the Railway Labor Act authorizes the making of dues deduction agreements. It is the contention of the appellees that the only logical and effective application of this permission to make dues deduction agreements is to read that permissive section with the next following subsection of Section 2 Eleventh, which is Section 2 Eleventh (c) (45 U.S.C.A. 152 Eleventh (c)). That section provides and means that the requirement of membership in a labor organization under a union shop agreement can be satisfied as to any individual employee working as a yardman, if he maintains membership in the B.R.T., because the B.R.T. is an organization national in scope, organized in accordance with the Act and admits to membership employees of a craft or class in any of the four services referred to in the Act, engine,

train, yard or hostling. Being such an organization the B.R.T. thus has the right to enter into a dues deduction agreement with the employer Southern Pacific Company.

To hold otherwise would prevent a logical application of the amended statute. For, due to the frequent change of work by the employee in operating service from one class to the other, that is, from yard service to train service and vice versa, there would be a constant conflict which would, in effect, nullify the permission granted by the amended Act to enter into such agreements.

ARGUMENT.

I.

THE RAILWAY LABOR ACT PROVIDES FOR CHECK-OFF OF DUES AGREEMENTS, WITH QUALIFIED LABOR ORGANIZATIONS WHETHER OR NOT THAT ORGANIZATION IS THE DESIGNATED COLLECTIVE BARGAINING UNION.

Section 2 Eleventh, of the Railway Labor Act (45 U.S.C.A. Sec. 152 Eleventh) provides:

“Notwithstanding any other provision of this chapter * * * any carrier or carriers defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirement of this chapter shall be permitted * * *.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing

the craft or class of such employees, of any periodic dues, initiation fees, and assessments * * *.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership.”

The provisions of the above Act make it clear that (1) check-off of dues is permissible (45 U.S.C.A. Sec. 152 Eleventh (b)) when an employee is a member of a labor organization national in scope, organized in accordance with the Railway Labor Act, admitting to membership employees of a craft or class in the four services, engine, train, yard, hostling, (45 U.S.C.A. Sec. 152 Eleventh (c)); (2) when the check-off of dues is made payable to the labor organization of which the employee is a member (45 U.S.C.A. 152 Eleventh (c)).

Those employees of the Southern Pacific Company who are members of the B.R.T. and maintain their membership in that organization certainly satisfy the union shop agreement, for the B.R.T. is the collective bargaining agent for the craft of trainmen (T.R. 5). There can be no other reasonable interpretation of the foregoing provisions of the Railway Labor Act. The amendment of 1951 expands the Act for the benefit of any labor organization that qualifies as a labor organization, national in scope, organized in accordance with the Labor Railway Act, and admitting to membership employees of the craft or class in any of said four services involved and which is the collective bargaining agent for any one of the three separate crafts of employees. The B.R.T. is such an organization (T.R. 5).

Section 2 of the Railway Labor Act (Section 152 of 45 U.S.C.A. 478) provides that "employees shall have the right to organize and bargain collectively through representatives of their own choosing", and provides that there shall be freedom from interference by the carrier and the general deduction of dues from wages are forbidden.

However, the preceding section is qualified by the 1951 amendment to the act known as the "Union Security and Check-Off Agreements" (Section 2, Eleventh (a), (b), (c) of 45 U.S.C.A. 481-482) and this qualification allows a "labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of the Railway Labor Act" to make agreements, etc.:

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership; *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.”

Under this Union Security Agreement the duly designated labor organization authorized to represent employees in accordance with the requirements of the Railway Labor Act shall be permitted (a) to make agreements that within 60 days following beginning of employment, all employees shall become members of the labor organization representing their craft or class.

(c) That the above requirements of membership in a labor organization shall be satisfied “if said employee shall hold or acquire membership in any one of the labor organizations, national in scope admitting to membership employees of train, engine and yard service.

The organizations admitting to membership employees in train, engine and yard service are the

Brotherhood of Railroad Trainmen, the Switchmen's Union of North America, the Order of Railway Conductors and Brakemen, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers (T.R. 91, 92, 93).

In the light of the above provisions a yardman may belong to the Brotherhood of Railroad Trainmen or the Switchmen's Union of North America or the Order of Railway Conductors and Brakemen. If he belongs to any one of these organizations he can qualify as coming under the Union Shop provisions of the Act (Section 2 Eleventh (c)) of the Railway Labor Act, 45 U.S.C.A. 482, Section 152. This is so by the clear terms of the Act, even though the bargaining agreement is held by the Switchmen's Union of North America or by the Order of Railway Conductors and Brakemen (T.R. 91, 92, 93).

Similarly, a locomotive fireman working under a contract held by the Brotherhood of Locomotive Engineers could qualify under the Union Shop Agreement by belonging to the Brotherhood of Locomotive Firemen and Enginemen or by belonging to the Brotherhood of Locomotive Engineers, or an engineer working under a contract held by the Brotherhood of Locomotive Firemen and Enginemen could qualify under a Union Shop agreement by belonging to the Brotherhood of Locomotive Firemen and Enginemen or the Brotherhood of Locomotive Engineers (T.R. 91).

The above latitude is allowed operating employees in selecting one of the qualifying organizations in

which to hold membership irrespective of the organization representing the craft in which he is employed.

Thus, the statute allows members of the operating crafts to belong to a non-representing union. It was obviously the intention of Congress with regard to these members of the operating crafts to permit cross-membership and allow the worker to belong to whichever union he wishes to. It follows logically and obviously that he should be allowed to assign the money to pay his dues to that union. It would be utterly unworkable and contrary to the purpose and idea of the statute in allowing this cross-membership and to refuse to allow the assignment of dues to the union to which the man belongs. It may well be that such an interpretation could be made where there would only be one union to which the man could possibly belong, as in the non-operating crafts. For example, if the man could only belong to the railway clerks or the machinists, obviously it wouldn't be proper for some other union to be authorized to collect his dues, but the situation with the operating crafts is entirely different.

It was also obvious that in the minds of those who drafted this legislation that there was a reason for excepting the operating crafts because of the fluctuation in business and the dual capacity in which these men have occasion to work. The cross-representation provisions of the statute would be utterly unworkable and the dues deduction authority would be meaningless if it were handled on any other basis than through

membership in an authorized union irrespective of whether that union happened to hold the contract with regard to the particular capacity in which the man might be working at any given time.

Under the terms of the Dues Deduction Agreement, identified as Company File TRN 1-685 (T.R. 9, 10, 11, 12, 13, 14, 15) effective August 1, 1955, paragraph 1 (a) thereof merely provides for the deduction of dues payable to the Brotherhood of Railroad Trainmen by its members from wages earned in any of the services or capacities covered in Section 3, First (h) of the Railway Labor Act, defining the jurisdictional scope of the First Division, National Railroad Adjustment Board. Conductors hold seniority as brakemen on their respective seniority districts and, likewise, brakemen, following promotion to conductors, hold seniority as conductors. For example, a brakeman who holds seniority as a conductor may work a portion of a month as a brakeman and a portion of the month as conductor. Similarly, he may hold a conductor's job for several months and thereafter return to his position as a brakeman (T.R. 99, 108). Obviously, if such an employee has signed a Wage Assignment Authorization payable to the Brotherhood of Railroad Trainmen, of which he is a member, it would be inconsistent for the carrier to deduct from earnings as a brakeman in one pay roll period and not be able to deduct from earnings as a conductor in another pay roll period when remitting to the Treasurer of the Local Lodge of the Brotherhood of Railroad Trainmen as provided in the Agreement. It may well

be that this man would be working under two different contracts, one to be held by the Brotherhood of Railroad Trainmen when he was working as a brakeman and the other possibly to be held by the Order of Railway Conductors and Brakemen when he was working as a conductor, but there would be a complete snarl if the dues deduction arrangement would depend upon the capacity in which he was working, rather than upon the membership in the particular organization.

Likewise, the same situation would exist if a brakeman would work for a period of time in the yard service or a yardman work for a period of time as brakeman in road service. In the one instance he might be working in yard service under the contract of the Switchmen's Union of North America and in the other instance he may be working in road service under the contract of the Brotherhood of Railroad Trainmen, but in either event the only practical way to make a dues deduction which he authorizes, is to recognize the organization to which he belongs and to which he has a right to belong under the union shop arrangement, with reference to the operating crafts. Any other interpretation would make the dues deduction arrangement so complicated and so inconsistent with the idea of the right to belong to any of the operating crafts at the employee's option that it cannot be believed that it was the intention of the drafters of this legislation that any such result would follow.

Under the provisions of Section 2, Eleventh (b) of the Railway Labor Act the Brotherhood of Railroad

Trainmen was authorized to negotiate with the Southern Pacific Company a Dues Deduction Agreement for the reason that this organization represents the craft or class of trainmen on the Southern Pacific (T.R. 5). Paragraph (b) in other words, would exclude any organization not representing a craft or class of employees in engine, train, yard or hostling service, engaged in any of the services defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, from entering into a Dues Deduction Agreement with the Southern Pacific. In addition, an organization authorized to enter into a Dues Deduction Agreement is similarly prohibited, under Section 2, Eleventh (c), from deducting dues from employees who do not hold membership in the organization. There is, however, nothing contained in the language of Section 2, Eleventh (b), prohibiting such organization, authorized to make a Dues Deduction Agreement, from having wage assignments made payable to the organization by its members from wages earned in any of the services or capacities covered in Section 3, First (h), of the Railway Labor Act defining the jurisdictional scope of the First Division, National Railroad Adjustment Board. The only other requirement of Section 2, Eleventh (b) is that the wage assignment authorization for deduction of dues payable to the organization must be voluntary upon the part of the individual employee.

II.

INTERCHANGEABLE NATURE OF EMPLOYMENT AND LEGISLATIVE HISTORY ESTABLISH THE RIGHT OF THE B.R.T. TO ENTER INTO CHECK-OFF OF DUES AGREEMENT WITH THE SOUTHERN PACIFIC COMPANY.

As pointed out above, the record in this case shows that in the railroad industry men whose principal employment is of one craft, for example, the craft of brakeman, are occasionally and sometimes frequently employed as members of another craft, for example, as conductors or as yardmen.

Employees who work interchangeably in the separate mentioned crafts nevertheless satisfy the union shop requirements according to Section 2, Eleventh (c) of the Railway Labor Act if they maintain membership in any one of the organizations which holds a contract for any of the three separate crafts of employees. Thus, a brakeman working as a conductor need not become a member of the Order of Railway Conductors and Brakemen in order to work as a conductor, or a member of S.U.N.A. in order to perform temporary work as a yardman. Consequently, through the qualified organization in which he maintains a membership, the employee can authorize dues deductions. The argument of S.U.N.A. is, however, that when such an employee is working as a yardman or a conductor he cannot be a party to a dues deduction agreement in favor of the B.R.T. even though he is a member of the organization which holds the collective bargaining agreement for the craft (trainmen) in which he regularly works. It is evident that if this

view were to be upheld the dues deduction provision instead of affording a measure of protection for an individual employee against the possibility of being in default in his dues and therefore subject to discharge, would engender a false sense of security and might lead to the employee's being in default although he had considered that he was fully protected.

Appellants have at some length discussed the legislative history of Section 2, Eleventh of the Railway Labor Act and have made mention of the arguments presented by Mr. Harry See, Legislative Representative of the B.R.T., before the Senate and House Committee and also of the arguments of Mr. George M. Harrison, representing the non-operating unions. However, at page 26 of their brief it is stated that:

“Congress did not adopt either the amendment proposed by the B.R.T. or the bills originally sponsored by Mr. Harrison on behalf of the Railway Labor Executives Association.”

It is apparent that both the House of Representatives and the Senate considered the arguments of both parties and then adopted the statute in its present form, which in effect adopts the position urged by Mr. See, by requiring that dues deductions are to be paid only to the union of which the employee is a member.

With reference to the remarks of Mr. Harrison of the Railway Clerks, they cannot be considered significant with respect to the question here involved. The Brotherhood of Railway Clerks for which Mr.

Harrison was speaking is one of the non-operating unions representing employees who do not have any duties directly connected with movement of trains, engines or cars and particularly in representing any of the employees specifically referred to in Subsection (c) of Section 2, Eleventh of the Railway Labor Act; that is, employees in engine, train, yard or hostling service. There is relatively little, if any, movement of employees from one craft to another, for example, from clerks to telegraphers or maintenance of way to shop crafts such as takes place between the operating crafts mentioned in Subsection (c). The remarks of Mr. Harrison were addressed particularly to the situation of the non-operating employees, the employees represented by the Brotherhood of Railway Clerks of which he is the President and Chief Executive Officer. Mr. Harrison obviously was not interested in the essentially different situation of the operating employees for which the special provisions of Subsection (c) were enacted.

It is clearly apparent that it was the intent of Congress that Subsection (b) of Section 2, Eleventh, upon which S.U.N.A. relies should and must be read with Subsection (c) in order not to nullify or impair the provisions of the latter section which operates to benefit and protect employees in the classes of service covered by Subsection (c).

The union shop amendment was intended to be primarily for the benefit of labor organizations. However, Congress certainly did not intend thereby to

impair or prejudice the rights of the operating employees to work in more than one craft or class of service as these rights existed prior to the amendment, which would certainly happen if the amendment was to be interpreted as contended for by the appellant.

To argue, as the appellant does, that there is no prejudice to the employee because he can voluntarily pay his dues to the organization of which he is a member, begs the question. The employee has the right to join the organization of his choice, and so long as that organization is qualified under the provisions of the Railway Labor Act, he has the right under the amendment to authorize his employer to deduct and check-off to that union his dues assessments, etc. If any other interpretation was to be placed on the permission granted in the amendment to make such agreements, it would nullify that permission. The right of the employee to authorize dues deductions, keeps him paid up and in good standing with his organization and keeps his insurance paid so that he is protected at all times. To deprive him of that right to protect himself simply because he was not a member of the union representing the craft of his work would definitely be prejudicial. This would be particularly so if the employee was of unsteady habits or forgetful because then to protect himself against these frailties he would be forced to join the union holding the bargaining agreement. Certainly, no such result was intended by the drafters of the amendment.

CONCLUSION.

In conclusion, it is urged that the only logical and practical interpretation of the Railway Labor Act as amended, is that made by the District Court and set out in its opinion filed herein which holds that the check-off of dues agreement entered into between the B.R.T. and the Southern Pacific was legal, and that, "the employee is not tied as far as payment of dues is concerned to the union holding the contract with the carrier, but rather to the union in which he holds membership." This is the same interpretation that has been placed upon the amendment by other operating unions and other railroads throughout the country (T.R. 94, 95). The Order of Railway Conductors and Brakemen have an identical check-off agreement (Tr. 100) and the S.U.N.A. has an identical agreement with Southern Pacific covering its members and applicable to those who might work at times in train service. It is therefore respectfully submitted that the judgment of the District Court be affirmed.

Dated, Oakland, California,

September 28, 1956.

HILDEBRAND, BILLS & McLEOD,
Attorneys for Appellees.

D. W. BROBST,
Of Counsel.

(Appendix Follows.)



Appendix.



Appendix

In the United States District Court for the Northern
District of California, Southern Division

Southern Pacific Company,
a corporation,

Plaintiff,

vs.

No. 35,058

Switchmen's Union of North America,
a Voluntary Association, et al.,
Defendants.

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MEMORANDUM OPINION

Roche, Chief Judge:

This is an action for declaratory relief brought by plaintiff, Southern Pacific Company, against the defendants Switchmen's Union of North America (hereinafter referred to as Switchmen's Union) and the Brotherhood of Railroad Trainmen (hereinafter referred to as the Trainmen's Union). This court has jurisdiction of the subject matter because this suit arises under a law regulating commerce, the Railway Labor Act (Title 45 U. S. C., Sec. 151 et seq.), particularly Sec. 2, Eleventh of said Act (45 U. S. C., Sec. 152, Eleventh). The complaint in said action alleges that the amount involved in controversy exceeds \$3,000.00.

The defendants have moved for summary judgment and the Court will dispose of this matter on the record before it. The only issue presented is the legal one of whether under the Railway Labor Act (45 U. S. C., Sec. 151, et seq.) an agreement was lawfully entered into between the Southern Pacific and the Trainmen's Union, which agreement provides for the deduction of dues of members of the Trainmen's Union who are in the employ of the Southern Pacific, notwithstanding the fact that certain members of the Trainmen's Union are working as yardmen, and therefore are subject to the collective bargaining agreement between the Southern Pacific and the Switchmen's Union.¹

¹The National Mediation Board has certified the Switchmen's Union as the exclusive collective bargaining representative of the craft of yardmen.

The agreement in question was entered into on June 23, 1955, effective August 1, 1955 and provides that the Southern Pacific will check off and pay over to the Trainmen's Union "periodic dues, initiation fees, assessments and insurance" from the wages of all members of the Trainmen's Union employed by the Southern Pacific "in any of the services or capacities covered in Section (3) First (h) of the Railway Labor Act defining the jurisdictional scope of the First Division, National Railroad Adjustment Board, upon the written and unrevoked authorization of a member." The carrier and the Trainmen's Union have applied the above described check-off agreement to the craft or class of yardmen at all times since the effective date of the agreement and the Southern Pacific has checked-off and paid over to the Trainmen's Union the dues, initiation fees, assessments and insurance of such of the yardmen as joined or were members of the Trainmen's Union and authorized such check-off. The Switchmen's Union entered into an identical agreement with the Southern Pacific on August 8, 1955, to be effective as of September 1, 1955.

On September 8, 1955 the Switchmen's Union took the position that the above check-off agreement violated Section 2, Fourth of the Railway Labor Act insofar as it was applicable to yardmen. The Switchmen's Union asked the Southern Pacific to cease giving effect to the agreement insofar as it applied to yardmen. Southern Pacific refused so to do, and in order to resolve the controversy filed this suit for declaratory relief.

Section 2, Fourth, of the Railway Labor Act (45 U. S. C. A., Sec. 152, Fourth) insofar as here relevant provides:

“it shall be unlawful for any carrier * * * to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions.”

Section 2, Eleventh, of the Railway Labor Act (45 U. S. C. A., Sec. 152, Eleventh) insofar as here relevant provides:

“Notwithstanding any other provision of this chapter * * * any carrier or carriers defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirement of this chapter shall be permitted—

* * *

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments * * *.

[“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the

First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership:] * * *

[That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.]

[(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.]

It is Southern Pacific's and the Trainmen Union's position that Section 2, Eleventh (b) of the Railway Labor Act which authorizes the making of dues deduction agreements generally, must be read in conjunction with the next following subsection of Section 2, Eleventh. The latter (Section 2, Eleventh (c)) specifically provides that the requirement of membership in a labor organization, under a union shop agreement made pursuant to the Act, shall be satisfied, as to employees in engine, train, *yard*, or hostling serv-

ice, if the employee holds or acquires membership in any one of the labor organizations national in scope, which are organized in accordance with the act and admit to membership employees of a craft, or class in any of the said four services.

The record in this case reveals that in the railroad industry men whose principal employment is in one craft, for example, the craft of brakemen, are occasionally, and sometimes frequently employed as members of another craft, for example, as conductors or as yardmen. In view of the interchangeable nature of the employment, it would seem that the only reasonable and workable interpretation of the statutes herein considered is that the union to which said man belongs shall have the right to enter a dues deduction agreement with the carrier, a right which is provided for in all of the contracts shown to the Court, including the contract of the Switchmen's Union itself.

Substantiating this conclusion is the report of the Committee on Labor and Public Welfare in Senate Report No. 2262 (81st Cong., Second Session, 1950, page 4319) in which is set forth the purposes and background of the legislation now before the court for construction and which states in part as follows:

"S. 3295 is intended to relax the prohibition contained in paragraphs fourth and fifth of Section 2 of the Railway Labor Act against all forms of union security agreements and against the deduction from the wages of employees of 'any dues, fees, assessments, or other contributions payable to labor organizations.'

The bill would also permit a carrier and a labor organization duly authorized to represent employees under the act to enter into agreements providing for the check-off from the wages of employees of periodic dues, initiation fees, and assessments. Here, too, the bill does not impose such an agreement; it merely permits a carrier and a labor organization, through the voluntary processes of collective bargaining, to include a check-off provision in the collective contract.

The present prohibitions against all forms of union security agreements as devices for establishing and maintaining company unions, thus effectively depriving a substantial number of employees of their right to bargain collectively. It is estimated that in 1934 there were over 700 agreements between the carriers and unions alleged to be company unions. These agreements represented over 20 percent of the total number of agreements in the industry.

It was because of this situation that labor organizations agreed to the present statutory prohibitions against union security agreements. An effort was made to limit the prohibition to company unions. This, however, proved unsuccessful; and in order to reach the problem of company control over unions, labor organizations accepted the more general prohibitions which also deprived the national organizations of seeking union security agreements and check-off provisions. It is thus clear that these organizations did not oppose union security and check-off agreements as such but merely their use as a means of carrier control over the bargaining process.

Since the enactment of the 1934 amendments, company unions have practically disappeared. Labor organizations representing employees in industries covered by the Railway Labor Act now seek to gain for themselves the right to bargain collectively with regard to union-shop agreements and check-off. This right is possessed by unions representing employees in industry generally. Your committee is of the opinion the right should now be extended to labor organizations subject to the Railway Labor Act.]”

It can be seen from the above that the abuse at which prior legislation had been directed was the use of dues deduction agreements as a means of carrier control over the bargaining process. Since company unions “have practically disappeared” it was the legislature’s intent to give “labor organizations covered by the Railroad Labor Act * * * the right to bargain collectively with regard to union-shop agreements and check-off”, a right possessed by unions representing employees in industry generally.

In conclusion, the Railway Labor Act, Section 2, Eleventh, Subdivision (c) (45 U. S. C. A., Sec. 152, Eleventh (c) provides that no agreements for deductions from an employee’s wages or dues, initiation fees, or assessments are to be made by the carrier payable “to any labor organization other than that in which he holds membership.” This provision, considered in the light of the overall legislative intent to give the railroad unions the rights possessed by union in industry generally, indicates that the employee is not tied as far as payment of dues is concerned to the

union holding the contract with the carrier, but rather to the union in which he holds membership.

In accord with the foregoing it is hereby declared that the said "Dues Deduction Agreements" hereinabove described are wholly valid and enforceable, and in accordance with the terms of the Railway Labor Act.

Dated: March 5, 1956.

Michael J. Roche
Chief Judge, U. S. District Court



United States
COURT OF APPEALS
for the Ninth Circuit

Switchmen's Union of North America, General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America; and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

-vs-

Southern Pacific Company, a Corporation, and Brotherhood of Railroad Trainmen, et al.,

Appellees.

PETITION OF SWITCHMEN'S UNION OF NORTH AMERICA, ET AL., FOR REHEARING

Appeal from the United States District Court, Northern District of California, Southern Division

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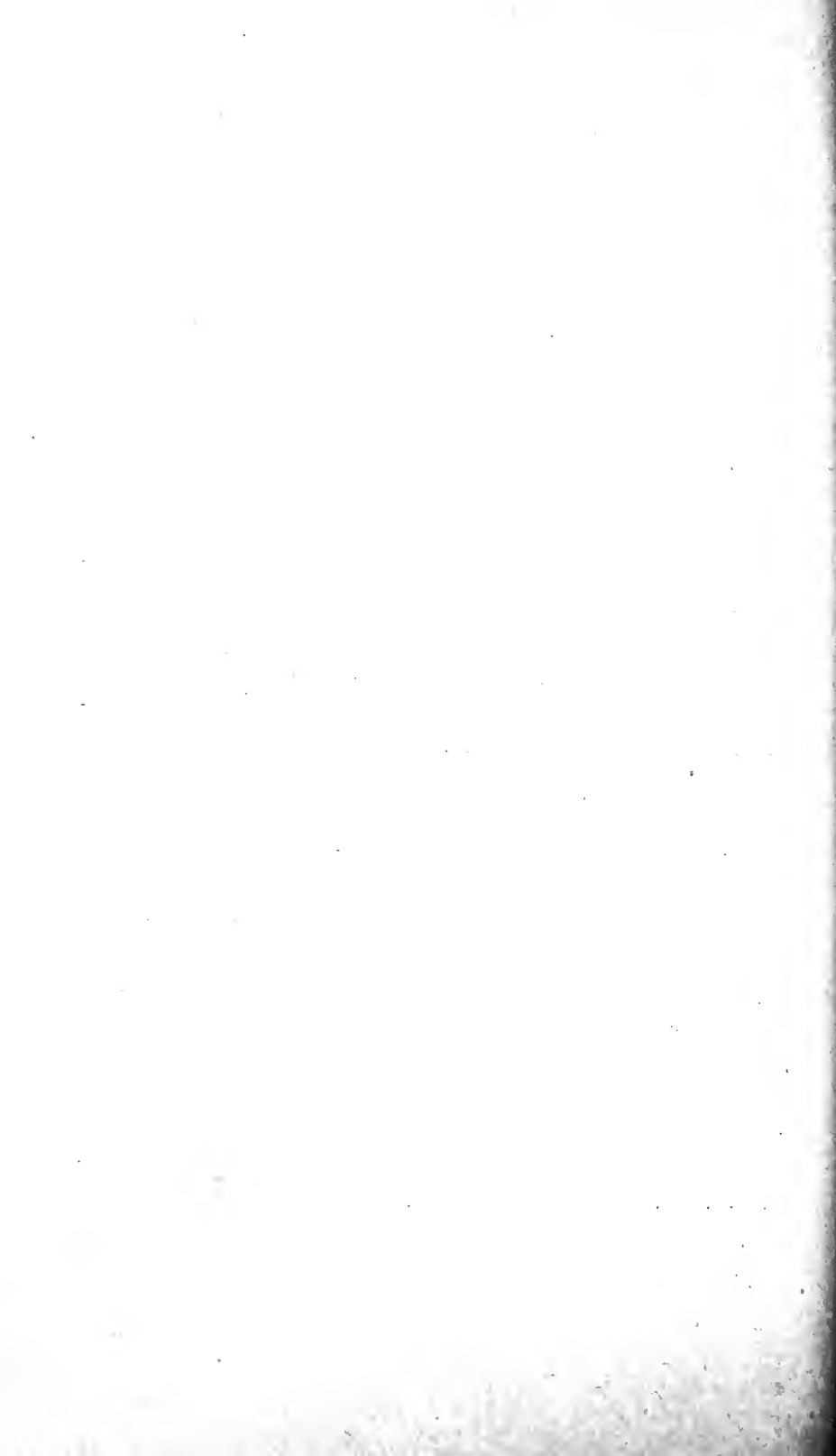
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FILED

JUN 13 1957

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United States
COURT OF APPEALS
for the Ninth Circuit

Switchmen's Union of North America, General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America; and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

-vs-

Southern Pacific Company, a Corporation, and Brotherhood of Railroad Trainmen, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division

PETITION OF SWITCHMEN'S UNION OF NORTH AMERICA, ET AL., FOR REHEARING

The Switchmen's Union of North America; General Adjustment Committee — Southern Pacific Company, Switchmen's Union of North America; Neil T. Speirs, as International Vice President, Switchmen's Union of North America; and John R. Burge, as General Chairman and as Acting General Chairman, Switchmen's

Union of North America, respectfully petition this Court to grant a rehearing and upon such rehearing to hold that the counterclaim filed by the Switchmen's Union states a good cause of action which this Court will determine on the merits, and upon such determination of the merits to hold that the check-off agreement is invalid insofar as it applies to employees represented by the Switchmen's Union. As grounds for such rehearing, petitioners show:

1. We believe that this Court through inadvertence overlooked the fact that this is an appeal from the dismissal of the counterclaim filed by the Switchmen's Union (Tr. 46-49) as well as from the dismissal of the complaint. The counterclaim met all the requirements of a valid suit (Tr. 16-23). It alleged that the counterdefendants, by entering into a dues deduction agreement applicable to yardmen for whom the Switchmen had been certified as exclusive representative, violated the collective bargaining rights guaranteed to the Switchmen's Union by the Railroad Labor Act (Tr. 20-21). The counterclaim sought the usual injunctive relief appropriate to such a violation of the Switchmen's Union's rights under the Railway Labor Act (Tr. 23). The court below had treated the counterclaim as properly before it and decided the issues therein raised on the merits (Tr. 46-47).

If the original complaint for declaratory judgment were in any respect defective as not showing the existence of an actual controversy, it could be dismissed, but the Switchmen's Union would still have the right to a

decision on the merits on its counterclaim. *Pioche Mines Consol. v. Fidelity Philadelphia Trust Co.*, 9 Cir., 1953, 205 F.2d 336, 337.

The counterclaim stated a cause of action for violation of the rights of the Switchmen's Union as collective bargaining representative in all material respects the same as the causes of action often held within federal cognizance by the federal courts.

In holding that the Switchmen's Union is an "entire stranger" to the dues deduction agreement between the Brotherhood of Railroad Trainmen and the Southern Pacific Company, this Court refuses to follow *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 549. The position of the Switchmen's Union in this suit is the same as the position of the System Federation in that suit. Here the Switchmen's Union has been certified by the National Mediation Board as the exclusive bargaining representative of all the yardmen employed by the Southern Pacific Company (Tr. 4, 17, 27). There the System Federation had been certified as the exclusive representative of the shop craft employees of the Virginian Railway Company (300 U.S. at 539). In both instances the carrier failed to accord the certified bargaining representative exclusive recognition in that the carrier entered into, or claimed the right to enter into, a collective bargaining agreement with another labor organization applicable to employees for which the certified union was the exclusive representative. Here it is admitted that the Southern Pacific Company has entered into a collective bargaining agreement with the

Brotherhood of Railroad Trainmen which by its terms and as applied by the parties fixes certain terms and conditions of employment of yardmen, namely, that as a condition of employment, yardmen who are members of the Brotherhood of Railroad Trainmen and who sign authorization slips, shall have dues checked off from their wages and paid to the Brotherhood of Railroad Trainmen (Tr. 6-8, 9-13, 16, 20, 26, 27, 36, 43-44). There, the Virginian Railway maintained it had the right to deal with an unaffiliated association as the representative of such of its shop craft employees as chose it as their bargaining agent (300 U.S. at 522-523, 539-540). The Supreme Court held that the System Federation could enjoin the Virginian Railway from dealing with anyone other than the System Federation with respect to the employees represented by the System Federation (300 U.S. at 548-549).

A dues check-off agreement is a collective bargaining agreement. *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 1953, 205 F.2d 131, 136. By entering into the dues check-off agreement with the Brotherhood of Railroad Trainmen applicable to the yardmen for which the Switchmen's Union was the exclusive representative, the Southern Pacific Company violated its obligation to bargain exclusively with the Switchmen's Union as to all matters pertaining to yardmen.

In distinguishing *Texas & New Orleans R.R. v. Brotherhood*, 281 U.S. 548 (1930), on the ground that was "An action by a union to force the employer to accord to its (sic) rights guaranteed to it by statute, such

as its right to bargain with the employer," this Court ignores that this case involves precisely that issue. The complaint alleged a controversy between the carrier and the union which represented yardmen over the right of the union to bargain for yardmen to the exclusion of any other union (Tr. 4, 7-8). The counterclaim filed by the Switchmen's Union alleged that the dues check-off agreement with the Brotherhood of Railroad Trainmen violated the collective bargaining rights guaranteed to the Switchmen's Union by the Railway Labor Act (Tr. 20-21).

In addition to the *Virginian Railway* decision in the Supreme Court, there are numerous lower court decisions which recognize the status of a certified union to litigate any alleged violation of its collective bargaining rights. In *Smith v. B & O R.R. Co.*, S.D. Oh. W.D., 1956, 144 F. Supp. 869, 873, the Brotherhood of Railroad Trainmen and the Baltimore and Ohio Railroad Company had entered into a union shop agreement which the Order of Conductors claimed violated its rights as the certified bargaining representative of conductors. In holding that the court had jurisdiction to decide the case on the merits at the instance of the Conductors, the court said (144 F. Supp. at 873):

"The Conductors, as a railway labor organization, likewise do not have any administrative remedy available to them under the procedure provided by the Railway Labor Act as the bargaining representative of the class and craft of conductors on the defendant's railroad, which rights the defendants have violated and are threatening to violate, and this court has jurisdiction and power to grant injunctive relief to protect the rights of representation of said organization."

For other cases in which unions have been granted injunctive relief to protect their collective bargaining rights under the Railway Labor Act against bargaining with another union see *Brotherhood of R.R. & S.S. Clerks v. Virginian Ry. Co.*, 4 Cir., 1942, 125 F.2d 853, 859; *Railway Employees Coop. Ass'n v. Atlanta B & C R. Co.*, D. Ga., 1938, 22 F. Supp. 510, 514-515. Cf. *Nashville, C & St. L. Ry. v. Ry. Employees' Dept. of A.F.L.*, 6 Cir., 1937, 93 F.2d 340, 341, 344; *Railway Clerks v. Atlantic Coast Line R.R. Co.*, 4 Cir., 1953, 201 F.2d 36, certiorari denied, 345 U.S. 992; *Railroad Yardmasters v. Pa. R. Co.*, 3 Cir., 1955, 224 F.2d 226, 228; *Myers v. Louisiana & A. Ry. Co.*, W.D. La., 1933, 7 F. Supp. 92 (Myers sued both individually and as general chairman of the Order of Railway Conductors); same, W.D. La., 1934, 7 F. Supp. 97.

The status of the certified bargaining representative as the proper party to protect its exclusive bargaining rights cannot be made to depend upon the extent of the invasion of its rights. The certified representative's bargaining rights exclude all dealings with anyone other than the representative chosen by the majority. *Order of Railroad Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347; *J. I. Case v. N.L.R.B.*, 321 U.S. 332, 338-339; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44.

2. If this Court should persist in its view that the Switchmen's Union did not have such an interest in setting aside the dues deduction agreement as to create an

actual controversy, we respectfully urge the Court to modify its opinion so that the Switchmen's Union may by an amended counterclaim make a party to the case one or more of the employees who are aligned with it in interest and have an actual controversy with the Southern Pacific Company and the Brotherhood of Railroad Trainmen. The Court by its opinion speaks only of an amended complaint. Fairness and equity require that there be extended to the Switchmen's Union an equal opportunity to file an amended counterclaim. Cf. *Pioche Mines Consol. v. Fidelity Philadelphia Trust Co.*, 9 Cir., 1953, 206 F.2d 336, 337.

For the foregoing reasons it is respectfully urged that this Court grant a rehearing of this case and decide it upon the merits. If our request for a rehearing is denied, it is respectfully urged that leave be granted the Switchmen's Union to file an amended counterclaim naming as additional counter-plaintiffs other persons who have an actual controversy with the counter-defendants.

Respectfully submitted,

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June 12, 1957



No. 15,148

In the

United States Court of Appeals

For the Ninth Circuit

SWITCHMEN'S UNION OF NORTH AMERICA,
GENERAL ADJUSTMENT COMMITTEE—
SOUTHERN PACIFIC COMPANY, SWITCH-
MEN'S UNION OF NORTH AMERICA; NEIL
T. SPEIRS, as International Vice Presi-
dent, Switchmen's Union of North
America, and JOHN R. BURGE as Gen-
eral Chairman and as Acting General
Chairman, Switchmen's Union of North
America,

Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, and BROTHERHOOD OF RAILROAD
TRAINMEN, et al.,

Appellees.

Petition for Rehearing of Appellee Southern Pacific Company

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In the

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SWITCHMEN'S UNION OF NORTH AMERICA,
GENERAL ADJUSTMENT COMMITTEE—
SOUTHERN PACIFIC COMPANY, SWITCH-
MEN'S UNION OF NORTH AMERICA; NEIL
T. SPEIRS, as International Vice Presi-
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America, and JOHN R. BURGE as Gen-
eral Chairman and as Acting General
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America,

Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, and BROTHERHOOD OF RAILROAD
TRAINMEN, et al.,

Appellees.

Petition for Rehearing of Appellee Southern Pacific Company

*To the United States Court of Appeals for the Ninth Circuit
and the Honorable Judges Thereof:*

STATEMENT OF GROUNDS FOR REHEARING

Southern Pacific Company, appellee in captioned cause, presents this its petition for rehearing based upon the following grounds:

1. The Court has not considered and applied Section 2 Fourth of the Railway Labor Act;
2. This Court has not considered and applied Section 2 Tenth of the Railway Labor Act;
3. This Court has not considered and applied the case of *Virginian Railway v. Federation*, 300 U.S. 515 (1937);
4. A rehearing should be granted because appellee Switchmen's Union of North America should also be given the right to join additional parties; and
5. A rehearing should be granted because no oral arguments have been presented on the question of jurisdiction.

ARGUMENT AND AUTHORITIES

This Court has rendered an opinion holding that it has no jurisdiction because there is no actual controversy existing between the Switchmen's Union of North America and either the Brotherhood of Railroad Trainmen or the Southern Pacific Company. Appellee Southern Pacific Company submits that a rehearing should be granted in this case for the reasons set forth in this petition.

I. The Decision of This Court Dismissing for Lack of Jurisdiction Should Be Reconsidered Because of its Inconsistency with Section 2 Fourth of the Railway Labor Act and Decisions of the United States Supreme Court in Such Cases as *Virginian Ry. v. Federation*, 300 U.S. 515 (1937).

An examination of the opinion of the Court in this case clearly discloses that the Court has not considered the nature of the right claimed by the Switchmen's Union of North America (hereinafter referred to as Switchmen's Union) and that the source of that right is Section 2 Fourth rather than Section 2 Eleventh of the Railway Labor Act. The opinion cites and relies only upon Section 2 Eleventh

of the Railway Labor Act (45 U.S.C. § 152 Eleventh). It fails to take any note of Section 2 Fourth (45 U.S.C. § 152 Fourth).

This case is concerned primarily with whether or not the dues deduction agreements involved come within the purview of Section 2 Eleventh. Therefore, the previous arguments of the parties in this case have been directed to the problem of how Section 2 Eleventh is to be interpreted. However, Section 2 Eleventh gives the Switchmen's Union no rights and, by itself, creates no controversy between the parties for the purposes of Federal Court jurisdiction even if the Switchmen's Union's contention concerning Section 2 Eleventh is sustained. Any rights which the Switchmen's Union may have are based not upon Section 2 Eleventh but upon Section 2 Fourth of the Railway Labor Act, which this Court has overlooked and failed to consider.

The failure of the Court to consider the effect of Section 2 Fourth is undoubtedly due to the fact that if it is held that the dues deduction agreements do not come within the exemption of Section 2 Eleventh, the rights guaranteed to Switchmen's Union by Section 2 Fourth arise automatically. Therefore, the parties have previously had no occasion or reason to present arguments concerning the interpretation or operation of Section 2 Fourth, which is a compelling reason for this Court to grant a rehearing.

Although the opinion of the Court is not clear on the point, it is apparently the position of the Court that it has no jurisdiction in this case for the simple reason that the Switchmen's Union is not a party to the alleged illegal dues deduction agreements and therefore has no rights accorded to it under Section 2 Eleventh of the Railway Labor Act. If this is the position of the Court, it is very clear that the Court not only has overlooked the very nature and purpose

of a declaratory judgment but also has not applied Section 2 Fourth of the Railway Labor Act, the pertinent portion of which accords rights to labor unions and representatives rather than individual employees.

Section 2 Eleventh of the Railway Labor Act permits dues deduction agreements to be made *under certain circumstances*, and exempts such agreements from the prohibition contained in Section 2 Fourth. However, if the exemption of Section 2 Eleventh does not apply, then such agreements automatically become illegal under Section 2 Fourth. Thus, the outcome of this case, when decided upon its merits, depends upon the interpretation given to Section 2 Eleventh, and the previous arguments of the parties have been directed almost solely to that question. However, if the contention of the Switchmen's Union that the dues deduction agreements involved here are not exempt under Section 2 Eleventh is sustained, the right of the Union to obtain relief and the jurisdiction of this Court to grant such relief derive not from Section 2 Eleventh, but instead from Section 2 Fourth. Thus, it becomes clear that there is an actual controversy present in this case as to whether rights guaranteed to the Switchmen's Union are being violated by Southern Pacific Company, and the Court does have jurisdiction to render a decision upon the merits in this case. In effect, Section 2 Eleventh constitutes a matter of defense on the part of Southern Pacific Company. It is Section 2 Fourth which accords rights to the Switchmen's Union.

That Section 2 Fourth of the Railway Labor Act accords rights to unions rather than individual employees is readily seen from an examination of the statute itself. Every single prohibition contained in Section 2 Fourth is designed to insure that employees will be free to join the union of their choice and to change unions. In the very words of the statute, the prohibitions against carriers are designed to pre-

vent the carrier from influencing or coercing "employees in an effort to induce them to join *or remain* or not to join or remain members of any labor organization." The statute clearly shows that the purpose of the prohibition against dues deduction agreements is *to prevent the carrier from assisting any particular organization in its efforts to remain in power*. The obvious beneficiary of the benefits bestowed by this section, and the party to which Congress clearly intended to accord rights, is the organization which may be trying to persuade employees to change their union affiliation.

Moreover, under the rule of *Virginian Ry. v. Federation*, 300 U.S. 515 (1937), the Switchmen's Union is entitled to injunctive relief to enforce rights accorded to it by Section 2 Fourth of the Railway Labor Act. Therefore, Southern Pacific Company respectfully submits that a rehearing should be granted in this case not only because the Court has not referred to or applied the language of Section 2 Fourth but because its decision is contrary to the decision of the United States Supreme Court in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937).

Since, as has been seen, this case involves an alleged violation of rights which are clearly guaranteed to the Switchmen's Union by Section 2 Fourth of the Railway Labor Act and such rights may be enforced by injunction under the rule of *Virginian Ry. v. Federation*, 300 U.S. 515 (1937), it is clear that this is a proper case for a declaratory judgment over which the Court has jurisdiction.

An acknowledged authority on the law of declaratory judgments has pointed out that this is exactly the type of situation which is the proper subject of an action for declaratory judgment. Thus, it is stated in Borchard, *Declaratory Judgments* (2d ed.), pp. 505-06:

“Parties to contracts, faced by the claim of a co-contractor or *qualified third party* that the contract is invalid and not binding on the defendant, and placed thereby in danger or fear of loss or prejudice, may resort to a declaratory action to sustain the validity and binding nature of the contract and thus relieve their insecurity. The defendant’s claim of invalidity may precede or follow a purported breach or may consist simply in a challenge of the plaintiff’s rights, which the declaration is designed to re-establish and assure against similar attack. The challenge may be directed to the plaintiff’s power to enter into the contract, an issue which ought to be settled before a legal structure has been built upon it. It may be directed to the form or substance of the contract, relying in turn upon statute or will or other source to justify the invalidity.” (Emphasis added.)

In addition, Borchard goes on to state (p. 509) :

“The contesting defendant may be a private person affected in some way by a contract already made or about to be made by the plaintiff. Asserting that the contract, executed or proposed, is invalid, he affords the plaintiff a sound motive for seeking judicial protection against the charge of illegality or the danger of outside interference by removing through a declaratory judgment the cloud cast upon his rights by the charge or claim.”

No language could be any more applicable to the case at bar.

II. A Rehearing Should Be Granted in This Case Because, Since the Switchmen's Union has a Vital Interest in the Determination of this Legal Question, it Should Also Be Given the Right to Join Individual Employees if That Is Necessary for this Court to Acquire Jurisdiction.

It has already been demonstrated that the Switchmen's Union has just as great an interest in the question presented by the case at bar as any of the other parties. However, the only party to which the Court has given leave to add an individual as a party is the appellee Southern Pacific Company. Therefore, an additional reason why a rehearing should be granted in this case is that the Switchmen's Union should also be given the right to join individual employees as parties if that is necessary to acquire jurisdiction.

III. This Court Did Not Affirm or Deny the Action of the District Court Which Denied the Switchmen's Union's Counterclaim for Injunctive Relief. If the Dues Deduction Agreements Involved in This Case Are Not Permitted by Congress in Section 2 Eleventh of the Railway Labor Act, the Switchmen's Union Is Entitled to an Injunction.

If the Court has based its holding that it has no jurisdiction upon the ground that the Switchmen's Union is not entitled to an injunction even if Sections 2 Fourth and 2 Eleventh provide that a dues deduction agreement is illegal when entered into by an employee of one union who is working at a job for which another union is the bargaining agent, the decision is contrary to the decision of the United States Supreme Court in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937), which the Court has not taken note of in its opinion.

It should be noted that the Court, in dismissing for lack of jurisdiction, has treated this case solely as an action for a declaratory judgment. Thus, the decision overlooks the fact that the Switchmen's Union has counterclaimed for an injunction and the case is no longer only for a declaratory

judgment. The Court has, in effect, held either that the Switchmen's Union has no right to an injunction even in an original action requesting such relief or that, in no event, can the Switchmen's Union have any rights concerning dues deduction agreements under Section 2 Fourth of the Railway Labor Act. This, as we have already shown, overlooks Section 2 Fourth and the decision of the Supreme Court of the United States in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937). In any event, if such a holding is what the Court actually intended, it is respectfully submitted that the parties are, at the very least, entitled to have the Court so state in clear and explicit terms.

The history of the Railway Labor Act was discussed by the United States Supreme Court in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937), as follows (pp. 542-43) :

"First. The Obligation Imposed by the Statute. By Title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought 'to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board * * *' *Pennsylvania R. Co. v. Railroad Labor Board*, 261 U.S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not 'in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion.' *Pennsylvania Federation v. Pennsylvania R. Co.*, 267 U.S. 203, 216.

"In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their

employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. *Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks*, *supra*, 563. *By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations.*" (Emphasis added.)

The *Virginian Ry.* case concerned the obligation of an employer to "treat with" a union. It held that this was a mandatory obligation capable of being enforced by injunction. The following language of the Supreme Court in the *Virginian Ry.* case demonstrates, beyond any reasonable doubt, that the dues deduction prohibition of Section 2 Fourth also falls within the class of obligations which are enforceable by injunction. The Supreme Court stated (p. 545):

"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra*, lend support to the contention that its enactments, which are mandatory in form and

capable of enforcement by judicial process, were intended to be without legal sanction.³⁷

³⁷The 1934 amendment imposed various other obligations upon the carrier, to which criminal penalties were attached [§ 2 Tenth]—e.g., *prohibitions against helping unions, by contributions of funds, or assistance in the collection of dues, § 2, Fourth; * * ** (Emphasis added.)

The footnote by the Supreme Court, quoted above, shows that it could not be more obvious that the right of one union organization, if such right exists, not to have employees enter into dues deduction agreements favoring another union, is one which the Switchmen's Union is entitled to have enforced by injunction in this case as it has requested.

Under such circumstances, it is difficult to conceive of a situation which would more clearly present a case of an "actual controversy" as required by the statute providing for declaratory judgments (28 U.S.C. § 2201). Moreover, it is readily seen that this case falls directly within the purpose and the intent of the declaratory judgment statute.

It has been stated by the courts time and time again that the purpose of the declaratory judgment statute is to allow a dispute to be adjudicated before damage has actually been suffered without waiting for the other party to take the initiative.

King Kup Candies v. H. B. Reese Candy Co., 134 F.

Supp. 463 (1955);

Scott-Burr Stores Corp. v. Wilcox, 194 F.2d 989 (1952);

Hardware Mut. Cas. Co. v. Schantz, 178 F.2d 779 (1949);

Delaney v. Carter Oil Co., 174 F.2d 314 (1949), *cert. denied*, 338 U.S. 824;

Dewey & Almy Chemical Co. v. American Anode, 137 F.2d 68 (1943);

Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa,
42 F. Supp. 917 (Idaho 1942);
Employers' Liability Assur. Corp. v. Ryan, 109 F.2d
690 (1940), *cert. dismissed*, 311 U.S. 722 (1940);
*Lehigh Coal & Navigation Co. v. Central R.R. of New
Jersey*, 33 F. Supp. 362 (Pa. 1940).

The record demonstrates that the Switchmen's Union has threatened appellee Southern Pacific Company that it will enforce its alleged rights under Section 2 Fourth and has attempted to do so by demanding an injunction in this case. Beyond a doubt, a controversy exists and this Court has jurisdiction to determine it.

IV. A Rehearing Should Be Granted Because, Although the Court States that its Decision Is Based Upon Jurisdictional Grounds, the Court has Actually Decided the Case Upon the Merits.

As pointed out in the opinion of the Court, there is no controversy between appellee Southern Pacific Company and appellee Brotherhood of Railroad Trainmen for the simple reason that they agree as to the correct interpretation of Section 2 Eleventh of the Railway Labor Act. However, the appellant, Switchmen's Union of North America, has contended that it has a right, *distinct from any right of an individual employee*, to have employees engaged in work in the craft for which the Switchmen's Union is the bargaining agent, free from dues deduction agreements in favor of another union organization. Moreover, the Switchmen's Union correctly contends that this right is guaranteed to it by Section 2 Fourth of the Railway Labor Act if the exemption of Section 2 Eleventh does not apply. Therefore, it is clearly seen that the decision of this Court in stating that it has no jurisdiction is actually holding either that the Switchmen's Union has no such right guaranteed to it by

Section 2 Fourth or that, even if it has such a right, it is a right without a remedy. One ground or the other is implicit in the holding of this Court that it does not have jurisdiction.

At the very least, the parties should be entitled to learn which of these two grounds was relied upon by the Court. However, in either event, the Court's opinion constitutes a decision upon the merits of the case which conflicts with the language of Section 2 Fourth of the Railway Labor Act and the decision of the United States Supreme Court in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937). It decides the very questions which appellee Southern Pacific Company sought to have resolved when it instituted the action for declaratory relief. However, by purportedly resting its decision on jurisdictional grounds, the Court has rendered a decision upon the merits in such a manner that appellee Southern Pacific Company cannot rely upon it in the event that the Switchmen's Union attempts to enforce its alleged statutory rights. Thus, the very purpose of actions for declaratory relief, which is to decide controversies before a party becomes injured, is nullified by the decision since it is clear that the Court necessarily had to come to a decision upon the merits before it could hold that there was no jurisdiction.

V. A Rehearing Should Be Granted in This Case Because the Court Has Not Considered Section 2 Tenth of the Railway Labor Act by Virtue of Which Appellee Southern Pacific Company May Incur Charges Involving Serious Legal Liabilities and Damage.

It has already been pointed out that the Declaratory Judgment Statute, 28 U.S.C. § 2201, is primarily designed to allow a party to have a dispute adjudicated before damage has actually been suffered without waiting for the party

who claims its rights have been violated to take the initiative.

- King Kup Candies v. H. B. Reese Candy Co.*, 134 F. Supp. 463 (Pa. 1955);
Berlitz School of Languages of America v. Donelly & Suess, 84 F. Supp. 75 (Pa. 1949);
Peoples Bank v. Eccles, 64 F. Supp. 811 (1946);
Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, 42 F. Supp. 917 (Idaho 1942);
Employers' Liability Assur. Corp. v. Ryan, 109 F.2d 690 (1940), *cert. dismissed*, 311 U.S. 722 (1940);
Hann v. Venetian Blind Corp., 15 F. Supp. 372 (Cal. 1936).

Under such circumstances, an additional reason why appellee Southern Pacific Company is entitled to institute an action for declaratory judgment in this case is found in Section 2 Tenth of the Railway Labor Act (45 U.S.C. § 152 Tenth) which also has been omitted from consideration by this Court. Section 2 Tenth provides in part as follows:

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, *fourth*, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. *It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of*

*the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof. * * ** (Emphasis added.)

While it is, of course, doubtful that Southern Pacific Company could be convicted of a "willful" failure to comply with Section 2 Fourth, nevertheless the possibility of such an action, even though it would be unlikely to succeed, very definitely exists. Thus, this is exactly the type of case and the type of situation which a declaratory judgment action is designed to remedy and over which the Court has jurisdiction. Therefore, appellee Southern Pacific Company submits that a rehearing should be granted in this case for the additional reason that the Court in denying jurisdiction has not considered Section 2 Tenth of the Railway Labor Act.

VI. A Rehearing Should Be Granted Because the Question of Jurisdiction Has Not Previously Been Fully or Adequately Argued.

Prior to and throughout the oral argument in this case, all of the parties were in agreement that the Court had jurisdiction. The question of jurisdiction was first raised by the Court itself at the time of the oral argument. When the question was raised by the Court, the parties had prepared no oral argument on the point since all parties conceded jurisdiction. Thereafter, the Court requested that supplementary briefs be filed. However, it is submitted that in view of the relatively short time allowed for submission of supplementary written briefs and the complexity of the problem which had not been considered previously, the briefs did not treat the subject as fully and adequately as is desirable for such an important point. Furthermore, the points set out in this petition demonstrate the need for oral

argument upon the question of jurisdiction. Appellee Southern Pacific Company, therefore, submits, that a rehearing is essential to a proper determination of this case and that a rehearing should be granted.

CONCLUSION

The opinion of the Court in this case shows that in deciding that it has no jurisdiction, the Court has relied solely upon Section 2 Eleventh of the Railway Labor Act. The Court has failed to consider and apply Sections 2 Fourth and 2 Tenth of the Railway Labor Act, the decision of the United States Supreme Court in *Virginian Ry. v. Federation*, 300 U.S. 515 (1937), and other cases setting forth the nature and purpose of a declaratory judgment action. The decision of the Court is in conflict with these authorities. Therefore, appellee Southern Pacific Company respectfully submits that a rehearing should be granted in this case.

Respectfully submitted,

BURTON MASON,

W. A. GREGORY

Attorneys for Appellee

Southern Pacific Company

City and County of
San Francisco, California.

I, W. A. GREGORY, hereby certify, in accordance with Rule 23 of Rules for the United States Court of Appeals for the Ninth Circuit, that I am one of the attorneys for appellee Southern Pacific Company; that the Petition of Appellee Southern Pacific Company for rehearing is presented in good faith and is not interposed for delay; and that in my opinion the petition is well founded.

This 13th day of June, 1957.

W. A. GREGORY

*Attorney for Appellee
Southern Pacific Company.*

No. 15156 ✓

United States *See Vol. 2975*
Court of Appeals
for the Ninth Circuit

R. H. PHILLIPS and JESSIE E. PHILLIPS,
his wife, R. R. HAGGERTY and WINNIE
HAGGERTY, his wife and D. EVERETT
PHILLIPS and EVELYN PHILLIPS, his
wife, individually and in behalf of the Cold
Creek Company, a partnership, Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

FILED

OCT - 2 1956



No. 15156

United States
Court of Appeals
for the Ninth Circuit

R. H. PHILLIPS and JESSIE E. PHILLIPS,
his wife, R. R. HAGGERTY and WINNIE
HAGGERTY, his wife and D. EVERETT
PHILLIPS and EVELYN PHILLIPS, his
wife, individually and in behalf of the Cold
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Yakima, Washington,

Attorney for Plaintiff-Appellee.

WALTER V. SWANSON,

Larson Building,

Yakima, Washington,

Attorney for Defendants-Appellants.



In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 452

UNITED STATES OF AMERICA,

Petitioner,

vs.

6,007.89 ACRES OF LAND, MORE OR LESS,
Situate in Yakima County, Washington, and R.
R. HAGGERTY, et al.,

Defendants.

DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, Gordon Gray, Secretary of the Army of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (26 Stat. 357; 40 U.S.C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U.S.C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes and the Act of Congress approved October 29, 1949 (Public Law 434—81st Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Fort Lewis Artillery Range, Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years commencing January 1, 1950 and ending June 30, 1950, extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States.

4. A plan showing the lands taken is annexed

hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands for the period commencing January 1, 1950 and ending June 30, 1950 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of the said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the . . . , by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Gordon Gray, Secretary of the Army, this the 13th day of January, A.D. 1950, in the City of Washington, District of Columbia.

/s/ GORDON GRAY,

Secretary of the Army of the United
States

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 6,007.89 acres of land, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof, and a statement of the gross sum estimated to be just compensation there-

for for the period ending June 30, 1950, is as follows:

Tract No. C-240

The west half of Section 3; all of Sections 4, 5 and 9; the west half of Section 10; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 2566.69 acres, more or less.

Tract No. C-241

All of Section 17; the north half and the north half of the southwest quarter of Section 20; the north half and the north half of the south half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 1520 acres, more or less.

Names of Purported Owners of Tracts C-240 and C-241: 1. R. R. Haggerty and Winnie Haggerty, his wife; 2. R. H. Phillips and Jessie E. Phillips, his wife; 3. D. Everett Phillips and Evelyn Phillips, his wife.

Addresses of Purported Owners: 1. Lind, Washington; 2. Lind, Washington; 3. Lind, Washington.

Estimated Compensation: \$842.50.

Tract No. C-261

All of Section 8, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Names of Purported Owners: Vera V. Taylor and Leslie W., her husband.

Address of Purported Owners: Route 5, Box 129, Yakima, Washington.

Estimated Compensation: \$48.00.

Tract No. C-277

All of Section 29; the north half of Section 32; the north half of Section 31; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 1281.20 acres, more or less.

Names of Purported Owners: Simon Martinez and Kathleen Martinez, his wife.

Address of Purported Owners: Sunnyside, Washington.

Estimated Compensation: \$440.50.

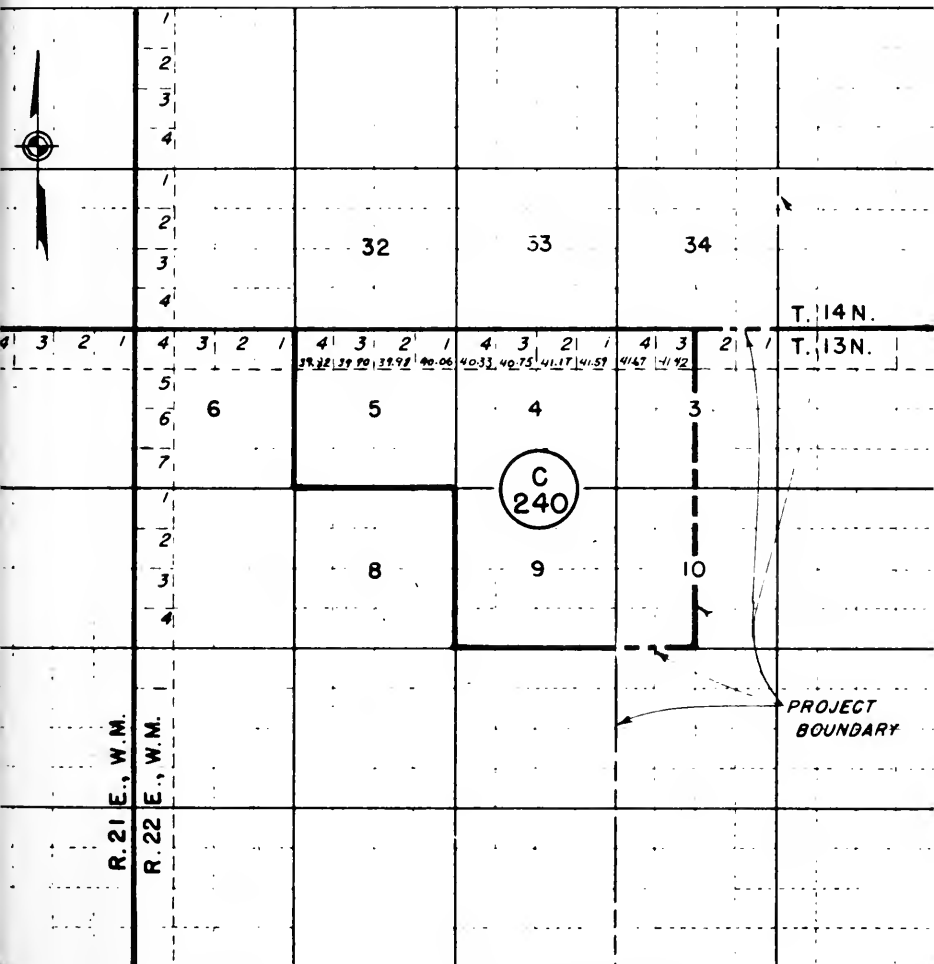
The amount of money estimated by the acquiring authority to be just compensation for the estate hereby taken, inclusive of all rights set forth in the declaration of taking, is One Thousand Three Hundred Thirty-One and No/100 Dollars (\$1,331.00).

[Endorsed]: Filed February 10, 1950.

TRACT MAP (WITH GRID)

Subject symbol No. Fort Lewis Artillery Range Tract No. C 240
 Name of owner R. H. Phillips, et al

Id work by _____ Date _____
Description of tract: W² section 3; all sections 4, 5 and 9; W² section 10,
township 13 north, range 22 east, W.M., Yakima County,
Washington.



CLASSES OF LAND

Scale 1 inches equals 1 mile

p land _____

tire land _____

rest land _____

sides of each class of land must be
own on the map proper
ame of any other class of land
olved.

I certify that this is an accurate map of tract C240
based on DEED DESCRIPTION which
shows this tract to contain 2566.69 acres, more or less.
Name Chelucha M. Berry
Title Draftsman, Carto.
Date 31 March 1987
Indicate whether map is based on general land office
records, aerial survey, deed description or actual survey.

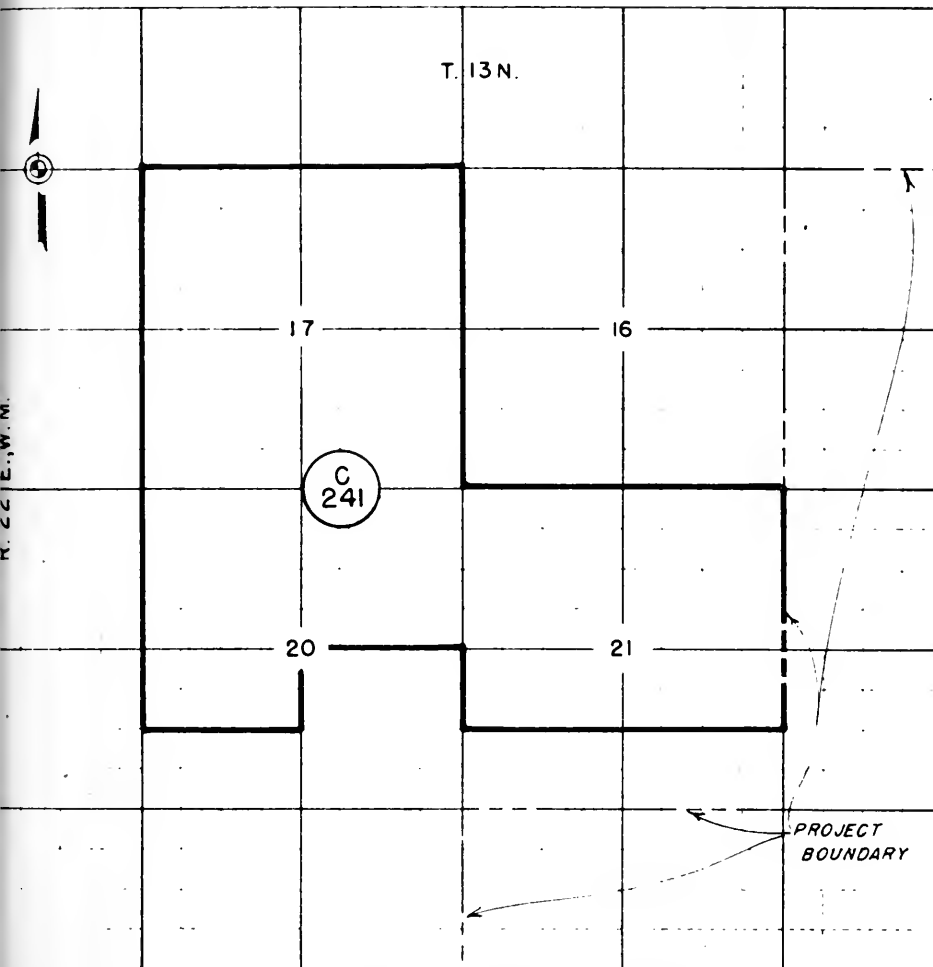
SCHEDULE "B"



TRACT MAP (WITH GRID)

9

Project symbol No. Fort Lewis Artillery Range Tract No. C 241
 Name of owner R. H. Phillips, et al
 Field work by Date
 Description of tract Section 17; N2, N2 SW4 section 20; N2, N2 S2 section 21
 all in township 13 north, range 22 east, W.M., Yakima County
 Washington.



CLASSES OF LAND

Scale 2 inches equals 1 mile

Open land ☐
 Pasture land ☐
 Forest land ☐
 Other ☐
 Acres of each class of land must be
 shown on the map proper
 Name of any other class of land
 involved.

I certify that this is an accurate map of tract C 241
 based on DEED DESCRIPTION which
 shows this tract to contain 1520.00 acres, more or less
 Name Delores M. Burr
 Title Draftsman, Carter
 Date 31 March 1949
 Indicate whether map is based on general land office
 records, aerial survey, deed description or actual survey

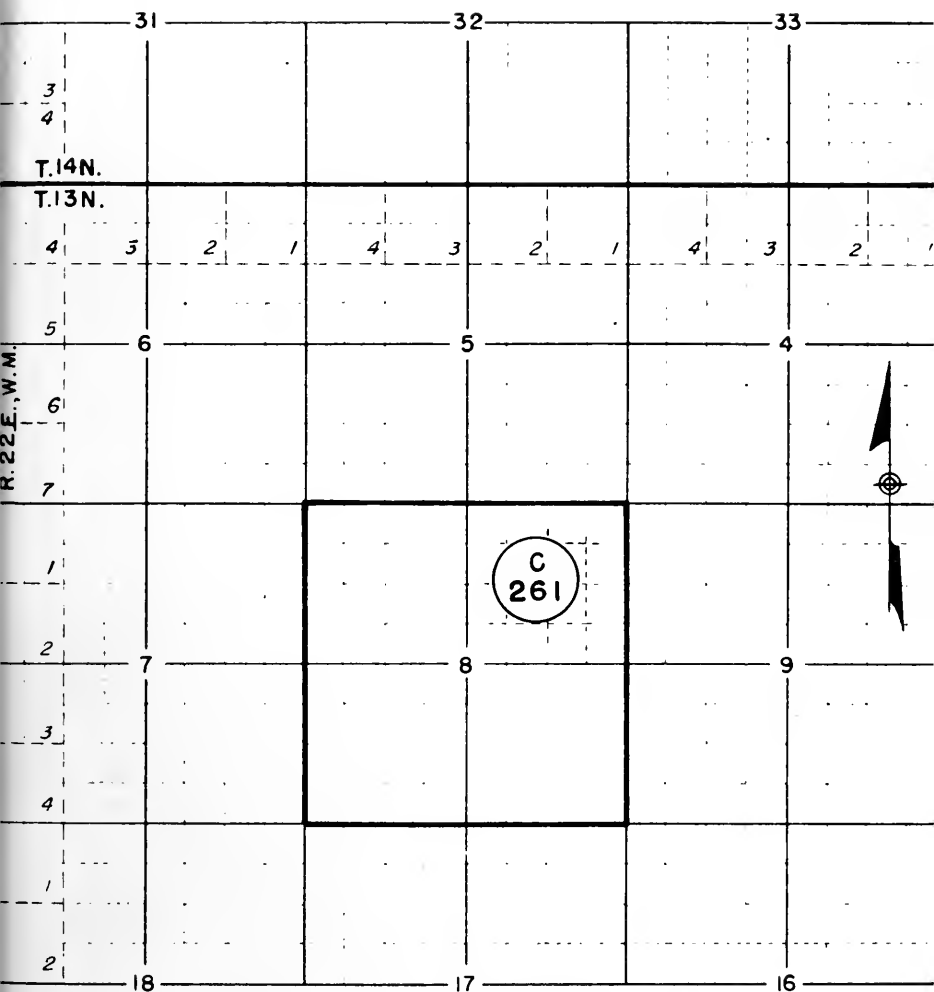
SCHEDULE "B"



TRACT MAP (WITH GRID)

10

Project symbol No. Fort Lewis Artillery Range Tract No. C 261
 Name of owner Vera V Taylor
 Field work by _____ Date _____
 Description of tract: All Section 8, T 13 N., R 22 E., W.M.,
Yakima County, Washington.



CLASSES OF LAND

Scale: 2 inches equals 1 mile

Top land _____ ☐
 Pasture land _____ ☐
 Forest land _____ ☐
 _____ ☐
 Grades of each class of land must be
 shown on the map proper
 Name of any other class of land
 involved _____

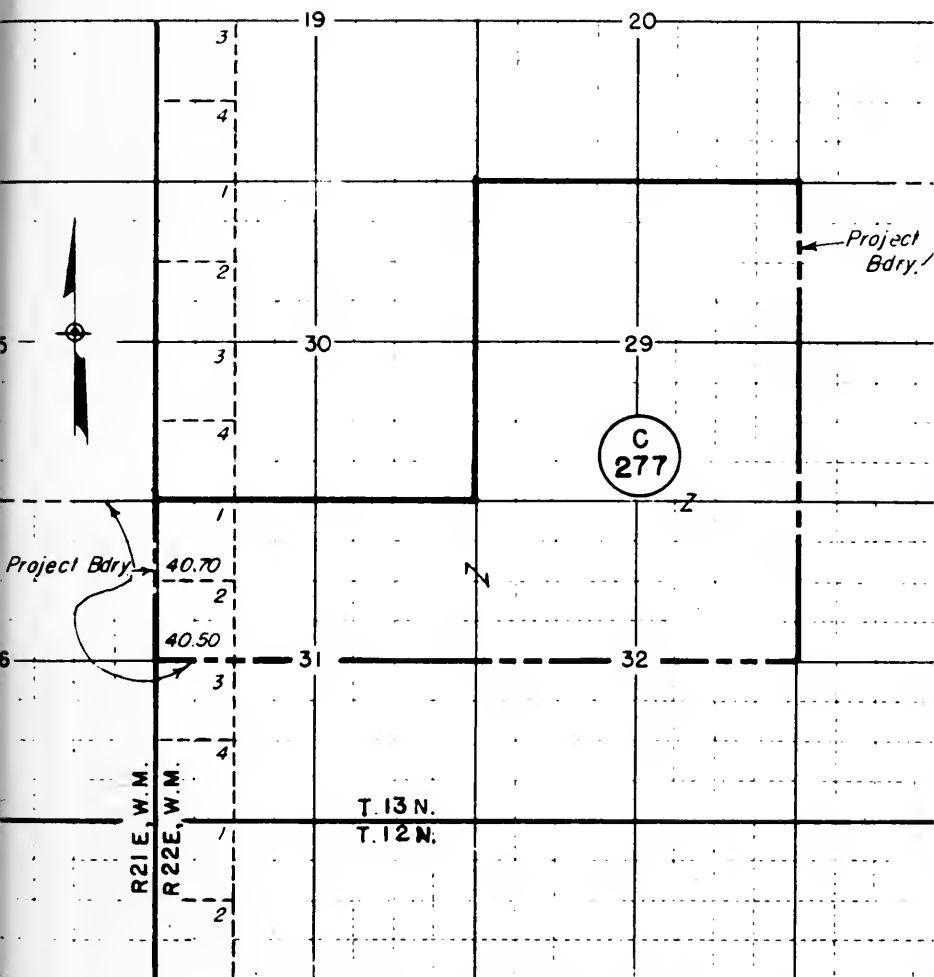
I certify that this is an accurate map of tract C 261
 based on DEED DESCRIPTION which
 shows this tract to contain 640.00 acres, more or
 Name Chelmsdale M. Baer
 Title Draftsman
 Date 20 Jan. 1949
 Indicate whether map is based on general land office
 records, aerial survey, deed description or actual survey

SHEET "B"

TRACT MAP (WITH GRID)

11

Project symbol No. Fort Lewis Artillery Range Tract No. C 277
 Name of owner Simon (Kathleen) Martinez
 Field work by _____ Date _____
 Description of tract: All of Section 29; N2 Sec. 32 and N2 Sec. 31, T.13 N., R.22 E.
W.M., Yakima County, Washington.



CLASSES OF LAND

Scale: 2 inches equals 1 mile

Crop land ☐
 Pasture land ☐
 Forest land ☐
☐

Grades of each class of land must be shown on the map proper
 Name of any other class of land involved.

I certify that this is an accurate map of tract C 277 based on DEED DESCRIPTION which shows this tract to contain 1281.20 acres, more or less.
 Name Cheluyka M. Baer
 Title Daughter
 Date 19 Jan. 1949
 Indicate whether map is based on general land office records, aerial survey, deed description or actual survey.

SCHEDULE "B"

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for a training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Fort Lewis Artillery Range, Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above entitled cause.

3. The estate taken for said public uses is a term for years commencing July 1, 1950 and ending June 30, 1951 extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands for the period commencing July 1, 1950 and ending June 30, 1951 is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of the said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Frank Pace, Jr., Secretary of the Army, this the 28th day of June, A.D. 1950, in the City of Washington, District of Columbia.

/s/ FRANK PACE, JR.,
Secretary of the Army

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 6,849.52 acres of land, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof, and a statement of the gross sum estimated to be just compensation therefor, for the period ending June 30, 1951, is as follows:

Tract No. C-230

The northwest quarter of Section 32, Township 14 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Name of Purported Owner: Ragnar L. Arnesen.

Address of Purported Owner: 3746 West Point, Dearborn, Michigan.

Estimated Compensation: \$30.00.

Tract No. C-233

The southeast quarter of Section 32, Township 14 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Names of Purported Owners: Stanley E. Stewart and Dorothy J. Stewart, his wife.

Address of Purported Owners: 3422 N. E. Klickitat Street, Portland, Oregon.

Estimated Compensation: \$30.00.

Tract No. C-247

Lot 4; and the southwest quarter of the northwest quarter of Section 4, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 79.39 acres, more or less.

Names of Purported Owners: Eva Skinner and Henry V. Skinner, her husband.

Address of Purported Owners: 506 South Rose Street, Kalamazoo, Michigan.

Estimated Compensation: \$15.00.

Tract No. C-241 A

The north half and the north half of the south half of Section 19; all of Section 18; the east half and the east half of the west half of Section 7; all except Lot 4 of Section 6; all in Township 13 North, Range 22 East of the Willamette Meridian; and the east half and the east half of the west half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian; all in Yakima County, Washington.

The land above described contains 2,714.84 acres, more or less.

Tract No. C-259

The west half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Names of Purported Owners of Tracts C-241 A and C-259: R. H. Phillips, et al., partners d.b.a. Phillips Haggerty Livestock Company.

Address of Purported Owners: Lind, Washington.

Estimated Compensation: \$910.00.

Tract No. C-275

The south half of the south half of Section 19, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 162.05 acres, more or less.

Tract No. C-280

All of Section 25, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Tract No. C-281

The east half of Section 26, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Names of Purported Owners of Tracts C-275, C-280 and C-281: Simon Martinez and Kathleen Martinez, his wife.

Address of Purported Owners: Sunnyside, Washington.

Estimated Compensation: \$280.00.

Tract No. C-243

The southwest quarter of Section 2, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Name of Purported Owner: Alva K. Wilson.

Address of Purported Owner: 106 West 10th Street, McMinnville, Oregon.

Estimated Compensation: \$30.00.

Tract No. C-246

Lot 3 and the southeast quarter of the northwest quarter of Section 4, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 79.27 acres, more or less.

Names of Purported Owners: 1. Bertha Tabbat; 2. Grace Lyche; 3. Myrtle Miller; 4. Nina Carpenter Whitted; 5. Samuel H. Simmons; 6. Pearl M. Summers; 7. Fay Simmons; 8. Day Simmons; 9. Lena J. Fewless; 10. Fred Simmons; 11. Freda Carpenter; 12. Lester W. Carpenter; 13. Martha Carpenter.

Address of all Purported Owners: c/o Harcourt M. Taylor, Attorney, Liberty Building, Yakima, Washington.

Estimated Compensation: \$10.00.

Tract No. C-279

The south half of the north half of Lot 4 and the north half of the south half of Lot 4 in Section 30, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 20.47 acres, more or less.

Names of Purported Owners: 1. Richard William Strawhun; 2. Pauline Mehner.

Addresses of Purported Owners: 1. Charlotte Avenue South and Preble, Bremerton, Washington; 2. Charlotte Avenue South and Preble, Bremerton, Washington.

Estimated Compensation: \$5.00.

Tract No. C-253

The east half of the northeast quarter of Section 8, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 80 acres, more or less.

Name of Purported Owner: Charles W. Camp.

Address of Purported Owner: 336 Ocean Center Building, Long Beach, California.

Estimated Compensation: \$15.00.

Tract No. C-258

The north half of the southeast quarter; and the southeast quarter of the southeast quarter of Section 10, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 120 acres, more or less.

Names of Purported Owners: 1. Ruie Hartman; 2. William Clarence Buckley; 3. Jennie A. Pfingst; 4. Coral F. Buckley.

Addresses of Purported Owners: 1. Selah, Washington; 2. 654 S. W. Grant, Portland, Oregon; 3. Selah, Washington; 4. 319 North 21st Avenue, Yakima, Washington.

Estimated Compensation: \$20.00.

Tract No. C-264

The northeast quarter of Section 14, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 160 acres, more or less.

Names of Purported Owners: Bernadine A. Bittner and Henry J. Ditter, partners d.b.a. Bittner & Ditter.

Address of Purported Owners: 613 Voltaire Avenue, Yakima, Washington.

Estimated Compensation: \$30.00.

Tract No. C-265

The east half of the northwest quarter of Section 14, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 80 acres, more or less.

Name of Purported Owner: Elmer L. Mulhern.

Address of Purported Owner: 2831 Balboa Street, San Francisco 21, California.

Estimated Compensation: \$15.00.

Tract No. C-270

The south half of Section 17, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 320 acres, more or less.

Tract No. C-271

All of Section 19, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 633.50 acres, more or less.

Tract No. C-272

All of Section 21, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The land above described contains 640 acres, more or less.

Names of Purported Owners of Tracts C-270, C-271 and C-272: Ona B. Jarvis and George W. Jarvis, her husband.

Address of Purported Owners: c/o Wyalta Oil Company, Casper, Wyoming.

Estimated Compensation: \$400.00.

The amount of money estimated by the acquiring authority to be just compensation for the estate hereby taken, inclusive of all rights set forth in the declaration of taking, is One Thousand Seven Hundred Ninety and No/100 Dollars (\$1,790.00).

[Endorsed]: Filed July 17, 1950.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil Action No. 762

UNITED STATES OF AMERICA,

Plaintiff,

vs.

6,868.22 ACRES OF LAND, MORE OR LESS, in
Yakima County, Washington; R. H. Phillips
and Jessie E. Phillips, his wife; R. R. Haggerty
and Winnie Haggerty, his wife; D. Everett
Phillips, also known as D. Everett Phillips, and
Evelyn Phillips, his wife; R. H. Phillips,
D. Everett Phillips and R. R. Haggerty, a
partnership doing business as Phillips, Hag-
gerty Livestock Company; Yakima County,
Washington, a municipal corporation; and Un-
known Owners. Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved August 1, 1888 (26 Stat. 357; 40 U.S.C. Sec. 257), and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50

U.S.C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 10, 1952 (Public Law 488—82nd Congress), which Act appropriated funds for such purposes.

3. The use for which the property is to be taken is for military purposes.

4. The interest to be acquired in the property is a term for years commencing October 28, 1952, and ending on June 30, 1953, extendible for yearly periods thereafter at the election of the United States, until June 30, 1957, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term taken, or any extensions thereof, any and all improvements and structures placed thereon by or for the United States, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipe lines.

5. The property so to be taken is described in Exhibit "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Tracts C-205, C-209 and C-219

R. H. Phillips and Jessie E. Phillips, his wife;

R. R. Haggerty and Winnie Haggerty, his wife;

D. Everett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife;

R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company;

Yakima County, Washington, a municipal corporation.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners".

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ HARVEY ERICKSON,
United States Attorney

/s/ HART SNYDER,
Special Attorney, Dept. of Justice
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ HARVEY ERICKSON,
United States Attorney

/s/ HART SNYDER,
Special Attorney, Dept. of Justice

EXHIBIT "A"

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22, Except the north half of the northwest quarter thereof; all in said township and range.

The tract of land above described contains 5600.0 acres, more or less.

[Endorsed]: Filed December 17, 1952.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 892

UNITED STATES OF AMERICA, Plaintiff,

vs.

33,213.13 ACRES OF LAND, MORE OR LESS,

Situate in the County of Yakima, State of Washington, and R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company; Walter V. Swanson and Marjorie T. Swanson, his wife; R. H. Phillips and Jessie E. Phillips, R. R. Haggerty and Winnie Haggerty, D. Everett Phillips and Evelyn Phillips, Walter V. Swanson and Marjorie T. Swanson, a partnership doing business as Cold Creek Company; Northern Pacific Railway Company, a corporation; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation; The Unknown Heirs of any of the above named persons, if deceased; Also, All Other Persons, Parties, Firms or Corporations Unknown having or claiming any right, title, estate, lien or interest in or to the land described in the complaint herein, or any portion thereof, Defendants.

COMPLAINT

Comes Now the United States of America, by the undersigned attorneys, acting under and by direction of the Attorney General of the United States and alleges as follows:

1. This is an action of a civil nature brought by the United States of America at the request of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes, and the Act of Congress approved January 6, 1951 (Public Law 911—81st Congress), which Act appropriated funds for such purposes.

3. The use for which the property is to be taken is that of the United States of America and for public uses and said lands are being acquired under the direction of the Acting Secretary of the Army of the United States; that the said property is necessary adequately to provide for an artillery range and for a training and maneuver area for troops; that said property has been selected by the Acting Secretary of the Army of the United States for use in connection with the establishment of the Yakima Artillery and Anti-Aircraft Firing Range,

Yakima and Kittitas Counties, Washington, and for such other uses as may be authorized by the Congress of the United States or by Executive Order.

4. The interest to be acquired in the property is the fee simple title thereto, subject to existing easements for public roads and highways, for public utilities, for railroads and pipe lines.

5. The property so to be taken in these proceedings is situate in Yakima County, Washington, and in the above designated district and division and is described in Schedule "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are, as follows:

Tracts C-205, C-209, C-219

R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips, his wife; Phillips, Haggerty Livestock Company, a partnership; Walter V. Swanson and Marjorie T. Swanson, his wife; Cold Creek Company, a partnership; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation.

Tracts C-240, C-286, C-241, F-509, F-573, F-574,
F-524, F-575, F-576, F-577, F-526, F-529, F-578,
F-579, F-580, F-558, C-241-A, C-259

R. H. Phillips and Jessie E. Phillips, his wife;

R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips, his wife; Phillips, Haggerty Livestock Company, a partnership; Walter V. Swanson and Marjorie T. Swanson, his wife; Cold Creek Company, a partnership; Northern Pacific Railway Company, a corporation; Shell Oil Company, a corporation; Laurent Regimbal and Jane Doe Regimbal, his wife; Yakima County, Washington, a municipal corporation.

7. Yakima County, a municipal corporation of the State of Washington, may have or claim an interest in the property aforesaid by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff, and such persons are made parties to the action, under the designation "Unknown Owners".

9. That simultaneously with the filing of this petition, there has been filed in the above designated court and cause and as a part of this proceeding, declarations of taking covering the within described property, and that there has been deposited simultaneously therewith in the registry of the court a sum of money estimated to be just compensation for the taking of said property, to-wit, the sum of Four Hundred Thirteen Thousand and no/100 Dollars (\$413,000.00).

Wherefore the plaintiff demands judgment that the property be condemned and that just compensa-

tion for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ WILLIAM B. BANTZ,
United States Attorney

/s/ RONALD R. HULL,
Asst. United States Attorney
Attorneys for Plaintiff

Trial by jury of the issue of just compensation is demanded by plaintiff.

EXHIBIT "A"

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22,

Except the north half of the northwest quarter thereof; all in said township and range.

The tract of land above described contains 5600.0 acres, more or less.

Tract C-240

Sections 4, 5 and 9 and the west half of Section 10, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 2243.6 acres, more or less.

Tract C-241

All of Section 17; the north half and the north half of the southwest quarter of Section 20; the north half and the north half of the south half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 1520.0 acres, more or less.

Tract C-241-A

The following described lands in Yakima County, Washington: The east half, and the east half of the west half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian.

All of Section 6, Except Government Lot 4; the east half, and the east half of the west half of Section 7; all of Section 18; and the north half and the north half of the south half of Section 19; all in Township 13 North, Range 22 East of the Willamette Meridian.

The tract of land above described contains 2714.84 acres, more or less.

Tract C-259

The west half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract C-286

The west half of Section 3, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 323.09 acres, more or less.

Tract F-509

All of Sections 19, 29 and 31, and the south half of Section 30; all in Township 14 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Sections 13, 14, 23, 24, 25 and 35; and that part of Section 26 described as follows:

The west half of the northwest quarter;

The north half of the southwest quarter;

The southeast quarter of the southwest quarter;

The west half of the southeast quarter; and

The southeast quarter of the southeast quarter;

All in Township 14 North, Range 22 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 6289.5 acres, more or less.

Tract F-524

All of Section 5, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 645.38 acres, more or less.

Tract F-526

The east half of Section 10; all of Sections 11, 12, 13, 14 and 15; and the north half of Section 23; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 7, Township 13 North, Range 23 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 4479.0 acres, more or less.

Tract F-529

All of Sections 15, 21, 22 and 27 in Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 2560.0 acres, more or less.

Tract F-558

The northeast quarter; the north half of the northwest quarter; and the southwest quarter of the northwest quarter; all in Section 22, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 280.0 acres, more or less.

Tract F-573

The east half of Section 3, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 322.1 acres, more or less.

Tract F-574

All of Section 1, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 643.40 acres, more or less.

Tract F-575

The north half of Section 9, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-576

The north half and the north half of the south half of Section 24, Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Sections 19 and 20; the south half of the southwest quarter of Section 17; and all of Section 18, Except Government Lots 2 and 4 and the southeast quarter of the northeast quarter and the southeast quarter of the southwest quarter; all in Township 13 North, Range 23 East of the Willamette Meridian, in said Yakima County.

The tract of land above described contains 2324.0 acres, more or less.

Tract F-577

The south half of the northwest quarter; the northwest quarter of the northwest quarter; and the southwest quarter of the northeast quarter of Section 28, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 160.0 acres, more or less.

Tract F-578

The south half of Section 9, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-579

The north half of Section 29, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington.

The tract of land above described contains 320.0 acres, more or less.

Tract F-580

All of Section 17, Township 13 North, Range 23 East of the Willamette Meridian, Yakima County, Washington, Except the south half of the southwest quarter thereof.

The tract of land above described contains 560.0 acres, more or less.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause No. 892.]

DECLARATION OF TAKING

To the Honorable, the United States District Court:

I, John Slezak, Acting Secretary of the Army of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U.S.C., Sec. 171), which acts authorize the acquisition of land for military purposes, and the Act of Congress approved January 6, 1951 (Public Law 911—81st Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for an artillery range and for a training and maneuver area for troops. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Yakima Artillery and Anti-Aircraft Firing Range, Yakima and Kittitas Counties, Washington, and for such other uses as

may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the petition in the above-entitled cause.

3. The estate taken for said public uses is the fee simple title thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands with all buildings and improvements thereon and all appurtenances thereto and including any and all interest hereby taken in said lands is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the plaintiff, by its Acting Secretary of the Army thereunto authorized, has caused this declaration to be signed in its name by said John Slezak, Acting Secretary of the Army, this the 27th day of January, A.D. 1954, in the City of Washington, District of Columbia.

/s/ JOHN SLEZAK,

Acting Secretary of the Army

SCHEDULE "A"

The land which is the subject matter of this declaration of taking aggregates 33,213.13 acres, more or less, situate and being in the County of Yakima, State of Washington. A description of the lands taken, together with the names of the purported owners thereof and a statement of the sum estimated to be just compensation therefor, is as follows:

[Printer's Note: Attached description of lands is a duplicate of Exhibit "A" printed in full at pages 31-36 of this printed record.]

Names of Purported Owners of Tracts C-205, C-209, C-219, C-240, C-241, C-241-A, C-259, C-286, F-509, F-524, F-526, F-529, F-558, F-573, F-574, F-575, F-576, F-577, F-578, F-579 and F-580: 1. R. H. Phillips and Jessie E. Phillips, husband and wife; 2. R. R. Haggarty and Winnie Haggarty, husband and wife; 3. D. Everett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, husband and wife; 4. Phillips, Haggarty Livestock Company, a partnership; 5. Northern Pacific Railway Company, a Wisconsin corporation; 6. Coffin Sheep Company, a Washington corporation.

Addresses of Purported Owners: 1. Lind, Washington; 2. Lind, Washington; 3. Lind, Washington; 4. Lind, Washington; 5. 812 Smith Tower, Seattle 4, Washington; 6. 20 West Yakima Avenue, Yakima, Washington.

Estimated Just Compensation for Tracts C-205, C-209, C-219, C-240, C-241, C-241-A, C-259, C-286,

F-509, F-524, F-526, F-529, F-558, F-573, F-574, F-575, F-576, F-577, F-578, F-579 and F-580: Four Hundred Thirteen Thousand and No/100 Dollars (\$413,000.00).

The gross sum estimated to be just compensation for the lands hereby taken is Four Hundred Thirteen Thousand and No/100 Dollars (\$413,000.00).

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause No. 892.]

PETITION FOR DISMISSAL OF MINERAL RIGHTS FROM CONDEMNATION PRO- CEEDING

Come now the defendants, Phillips, Haggerty, et al., and respectfully petition the above entitled court and show:

1. That the defendants, Phillips, Haggerty, et al., are the owners of approximately 34,000 acres of fee land in the above captioned proceeding and other condemnation proceedings associated therewith. That all of said land under condemnation was leased to various oil companies, including Leo Oil and Shell Oil Company, prior to the filing of condemnation proceedings. That core drilling and prospecting are now being conducted on a large scale by various oil companies to the east, to the west and to the south of the subject property. That said prospecting, seismographing and core drilling are being conducted by substantial concerns such as

Standard Oil Company, Shell Oil Company, Leo Oil Company and Richfield Oil Company. That all of the subject property is in an active leasing and prospecting area.

2. That the defendants are and since the filing of the declaration of taking have been prevented from all or any kind of prospecting in said lands in order that the true value thereof be more fully extended. That the defendants are confronted with the necessary conclusion of a trial court that any value attached to the subject lands is speculative and therefore inadmissible in the trial of a condemnation proceeding other than that said lands may possibly have a value as suitable property for exploration purposes. That exploration was interrupted by the condemnor in the above entitled and associated proceedings. That the petitioners have no adequate remedy at law.

3. That noted geologists in the employ of all of the major oil companies in the area have expressed keen desire to lease said condemned property for exploratory purposes by reason of its peculiar character and geology.

4. That the condemnor at the time of and previous to the filing of declaration of taking was and is fully aware that the land in question is situate in an active leasing area, and notwithstanding said knowledge has failed and refused to make any provision for investigation of said asset either by way of preparation for trial or by way of retention of mineral rights in the condemnee whether restricted or otherwise.

Wherefore, your petitioners pray that an order be entered herein requiring the condemnor to show cause why the mineral rights in the above entitled cause should not be excluded from the condemnation proceedings under such restrictions, if necessary, as would be reasonable under the circumstance of continued operation of the area as a firing range and military sub-district of Fort Lewis, and for such other and further relief as may to the Court seem just or equitable in the premises.

/s/ WALTER V. SWANSON,
Attorney for Defendants

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1955.

[Title of District Court and Cause No. 892.]

ORDER DENYING PETITION FOR DIS-
MISSAL OF MINERAL RIGHTS FROM
CONDEMNATION PROCEEDING

This Case having come on this day in open court upon petition of the defendants, Phillips, Haggerty, et al., for dismissal of mineral rights from the condemnation proceeding herein, and the court having considered the records and files of the cause and having heard argument of counsel and being *fully in* the premises.

It Is Hereby Ordered and Adjudged that the petition of said defendants, Phillips, Haggerty, et

al., for dismissal of mineral rights from the condemnation proceeding herein and/or restricted use thereof be and the same is hereby denied.

Dated and Entered in open court this 24th day of June, 1955.

/s/ SAM M. DRIVER,
Judge of the United States
District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney

Approved as to Form:

/s/ WALTER V. SWANSON,
Attorney for Petitioners and Defendants,
Phillips, Haggerty, et al.

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause No. 892.]

ORDER ON CONSOLIDATION OF CAUSES FOR TRIAL

The above entitled cause coming on for trial and the order of court herein entered having been stipulated and agreed to by counsel, Walter V. Swanson, appearing for the defendants Phillips, Haggerty and others, and Ronald R. Hull, Assistant United States Attorney, appearing on behalf of the plaintiff United States.

It Is Hereby Ordered that upon trial of the above entitled cause, being cause No. 892, there shall be consolidated therewith the following causes of action:

Civil No. 452: United States vs. R. R. Haggerty, et al. (leasehold).

Civil No. 488: United States vs. Ragnar L. Arneson, et al. (leasehold).

Civil No. 762: United States vs. 6,868.22 acres, Phillips-Haggerty, et al. (leasehold).

It Is Further Ordered that the pertinent data upon which issues will be founded on trial of the above entitled causes, consolidated, has been agreed and stipulated to by respective counsel as follows:

Civil No. 892 (fee)

Declaration of Taking filed February 15, 1954.

Tracts:

C-205	628.22 acres
C-209	640.00 acres
C-219	5600.00 acres
C-240	2243.6 acres
C-241	1520.0 acres
C-241A	2714.84 acres
C-259	320.0 acres
C-286	323.09 acres
F-509	6289.5 acres
F-524	645.38 acres
F-526	4479.0 acres
F-529	2560.0 acres
F-558	280.0 acres
F-573	322.1 acres
F-574	643.40 acres

Tracts:

F-575	320.0	acres
F-576	2324.0	acres
F-577	160.0	acres
F-578	320.0	acres
F-579	320.0	acres
F-580	560.0	acres

33,213.13 acres

Civil No. 452 (leasehold)

Tracts:

C-240	2566.69	acres
(Includes C-240 and C-286 of Civil No. 892)		
C-241	1520.00	acres

4086.69 acres

Declaration of Taking filed February 10, 1950 for a term from January 1, 1950 to June 30, 1950, subject to extension.

Order for possession on Declaration of Taking, as of February 17, 1950.

Notices of extension of term filed annually to extend term to and including time of taking of fee.

Declaration of Taking on fee filed February 15, 1954 in Civil No. 892.

Civil No. 488 (leasehold)

Tracts:

C-241A	2714.84	acres
C-259	320.0	acres

3034.84 acres

Declaration of Taking filed July 5, 1950, for a term from July 1, 1950 to June 30, 1951, subject to extension.

Order for Possession, as of July 1, 1950, entered July 8, 1950.

Notices of extension of term filed annually to extend term to and including time of taking of fee, which is February 15, 1954, (Civil No. 892).

Civil No. 762 (leasehold)

Tracts:

C-205	628.22 acres
C-209	640.0 acres
C-219	5600.0 acres
	<hr/>
	6868.22 acres

Complaint filed December 17, 1952 for term of years from October 28, 1952 to June 30, 1953, subject to extension.

Term extended by notice to 1954.

Declaration of Taking on fee filed February 15, 1954.

Dated and Done in open court this 26th day of October, 1955.

/s/ SAM M. DRIVER,

Judge of U. S. District Court

Approved as to Form:

/s/ WALTER V. SWANSON,

Attorney for Defendants Phillips, Haggerty,
et al.

/s/ RONALD R. HULL,
Attorney for Plaintiff

[Endorsed]: Filed October 26, 1955.

[Title of District Court and Cause No. 452.]

Tracts C-240, C-241

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (4,086.69 acres) to be \$5,062.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, \$3,650.00; C. Marc Miller, \$2,850.00.

Defendants' witnesses: Stanford L. Haney, \$18,000.00; Howard Thomas, \$18,000.00; J. D. Urquhart, \$13,200.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 488.]

Tracts C-241-A, 259

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages

for the leasehold taken (3,034.84 acres) to be \$2,954.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, \$2,140.00; C. Marc Miller, \$2,230.00.

Defendants' witnesses: Stanford L. Haney, \$15,000.00; Howard Thomas, \$15,000.00; J. D. Urquhart, \$10,800.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 762.]

Tracts C-205, C-209, C-219

VERDICT

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (6868.22 acres) to be \$7,240.00.

/s/ LEO HAKE,
Foreman

Annual rental and severance damage:

Plaintiff's witnesses: V. J. Conner, \$4,370.00; C. Marc Miller, \$2,500.00.

Defendants' witnesses: Stanford L. Haney, \$30,000.00; Howard Thomas, \$27,000.00; J. D. Urquhart, \$27,500.00.

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause No. 892.]

VERDICT

We, the Jury in the above entitled cause, find just compensation for the taking of defendants' property (fee ownership of 33,213.13 acres), including severance damage to the remainder of defendants' ownership to be \$514,801.56.

/s/ LEO HAKE,
Foreman

Fee taking and severance damage:

Plaintiff's witnesses: V. J. Conner, \$425,000.00;
C. Marc Miller, \$335,000.00.

Defendants' witnesses: Stanford L. Haney, \$1,461,340.00; Howard Thomas, \$1,450,154.00; J. D. Urquhart, \$1,410,477.47.

[Endorsed]: Filed November 4, 1955.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 452

UNITED STATES OF AMERICA,

Petitioner,

vs.

R. R. HAGGERTY and WINNIE HAGGERTY,
his wife; et al., Defendants.

JUDGMENT ON VERDICT AS TO TRACTS
C-240 and C-241

The above entitled cause with which was consolidated for trial Civil Cause No. 892, No. 488 and No. 762, came on regularly for trial October 24, 1955, the petitioner appeared by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General, and the defendants, R. R. Haggerty and Winnie Haggerty, husband and wife; R. H. Phillips and Jessie E. Phillips, husband and wife; and D. Everett Phillips and Evelyn Phillips, husband and wife, individually and doing business as a partnership as Phillips, Haggerty Livestock Company, appeared by their attorney, Walter V. Swanson. The defendant, Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-240 and C-241 (in Civil proceeding No. 892). The defendant, Northern Pacific

Railway Company, a corporation, appeared through its attorneys of record, and, the interest of said defendant Northern Pacific Railway Company was removed from trial herein and postponed for later determination, by order of the court dated October 24, 1955.

The issues arising on the petition for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 452.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (4,086.69 acres) to be \$5,062.00.

Leo Hake, Foreman

which said just compensation for the term January 1, 1950 to February 14, 1954, inclusive, as to Tracts C-240 and C-241 is computed at a total of Twenty Thousand Eight Hundred Sixty Six and 67/100 Dollars (\$20,866.67); and

It appearing to the court that immediately prior to the commencement of said action, on February 10, 1950, the fee simple title to said Tracts C-240 and C-241 was vested in the defendants, R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty

Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature with exception of the undetermined interest of the defendant Northern Pacific Railway Company; Now, Therefore,

The court having jurisdiction of each of the parties and of the subject matter herein and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Five Thousand Sixty Two and no/100 Dollars (\$5,062.00), represents the fair annual rental value of the interest acquired by the United States commencing January 1, 1950 as to said Tracts C-240 and C-241, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever, except as above stated, for all damages of whatsoever nature sustained by reason of the taking thereof for the term from January 1, 1950 to February 14, 1954, inclusive, is computed to be the sum of Twenty Thousand Eight Hundred Sixty Six and 67/100 Dollars (\$20,866.67), and that payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking, except as above stated.

It Is Further Ordered, Adjudged and Decreed that the total sum of Seven Thousand Five Hundred Eighty Two and 50/100 Dollars (\$7,582.50) heretofore deposited with the clerk of court in this

cause on the following dates and in the following amounts:

February 10, 1950	\$ 842.50
October 16, 1950	1685.00
December 3, 1951	1685.00
May 22, 1953	1685.00
September 15, 1953	1685.00

be and it is hereby applied upon the aforesaid amount leaving a balance payable in the amount of Thirteen Thousand Two Hundred Eighty Four and 17/100 Dollars (\$13,284.17); that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and the clerk of the court is hereby directed to disburse the amount of money now on deposit with respect thereto as follows:

To: R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, \$7,582.50.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of said defendants, R. R. Haggerty and Winnie Haggerty, his wife; R. H. Phillips and Jessie E. Phillips, his wife; D. Everett Phillips and Evelyn Phillips, his wife, in the principal sum of Thirteen Thousand Two Hundred Eighty Four and 17/100 Dollars (\$13,284.17), together with interest thereon computed as follows:

- (1) At 6% per annum on \$5,062.00 from January 1, 1950 until paid;
- (2) At 6% per annum on \$5,062.00 from January 1, 1951 until paid;
- (3) At 6% per annum on \$5,062.00 from January 1, 1952 until paid;
- (4) At 6% per annum on \$5,062.00 from January 1, 1953 until paid;
- (5) At 6% per annum on \$618.67 from January 1, 1954 until paid,

Less the following credits for interest deductible by reason of deposits into Court:

- (1) At 6% per annum on \$842.50 from February 10, 1950 until date of payment of judgment;
- (2) At 6% per annum on \$1685.00 from October 16, 1950 until date of payment of judgment;
- (3) At 6% per annum on \$1685.00 from December 3, 1951 until date of payment of judgment;
- (4) At 6% per annum on \$1685.00 from May 22, 1953 until date of payment of judgment.
- (5) At 6% per annum on \$1685.00 from September 15, 1953 until date of payment of judgment; that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of said deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or described in this cause of action has or had at the

time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on February 10, 1950 on which date the declaration of taking herein was filed there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever the following described interest in and to the following described lands:

A term for years commencing January 1, 1950 and ending June 30, 1950, extendible for yearly periods thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States, in and to the following described property, to-wit:

Tract C-240

The West Half of Section 3, all of Sections 4, 5 and 9; the West Half of Section 10; all in Township 13 North, Range 22 East of the Willamette

Meridian, Yakima County, Washington, containing 2566.69 acres, more or less.

Tract C-241

All of Section 17; the North Half and the North Half of the Southwest Quarter of Section 20; the North Half and the North Half of the South Half of Section 21; all in Township 13 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 1520 acres, more or less.

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,
Judge of U. S. District Court

Presented by:

/s/ RONALD R. HULL,
Assistant United States Attorney

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 488

UNITED STATES OF AMERICA,

Petitioner,

vs.

RAGNAR L. ARNESEN and JOHN DOE ARNE-
SEN, her husband, et al.,

Defendants.

JUDGMENT ON VERDICT AS TO TRACTS
C-241A and C-259

The above entitled cause consolidated for trial with Civil Cause No. 892, No. 452 and No. 762 came on regularly for trial October 24, 1955, the petitioner appearing by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General. The defendants, R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife, appeared by their attorney, Walter V. Swanson. The defendant Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-241A and C-259 (in Civil proceeding No. 892).

The issues arising on the petition for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 488.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (3,034.84 acres) to be \$2,954.00.

Leo Hake, Foreman

which said just compensation for the term July 1, 1950 to February 14, 1954, inclusive, as to Tracts C-241A and C-259 is computed at a total of Ten Thousand Seven Hundred and 13/100 Dollars (\$10,700.13); and

It appearing to the court that immediately prior to the commencement of this action on July 5, 1950 as to Tracts C-241A and C-259 described herein the fee simple title to all of said lands so described was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife; and R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature.

Now, Therefore, the court having jurisdiction of each of the parties and of the subject matter herein

and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Two Thousand Nine Hundred Fifty Four and no/100 Dollars (\$2,954.00), represents the fair annual rental value of the interest acquired by the United States commencing July 1, 1950 as to said Tracts C-241A and C-259, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking thereof for the term from July 1, 1950 to February 14, 1954, inclusive, is computed to be the sum of Ten Thousand Seven Hundred and 13/100 Dollars (\$10,700.13) and that payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the total sum of Three Thousand Six Hundred Forty and no/100 Dollars (\$3,640.00) heretofore deposited with the clerk of court in this cause on the following dates and in the following amounts:

July 17, 1950	\$910.00
February 16, 1952	910.00
May 28, 1953	910.00
September 15, 1953	910.00

be and it is hereby applied upon the aforesaid amount leaving a balance payable in the sum of Seven Thousand Sixty and 13/100 Dollars (\$7,-

060.13); that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and the clerk of the court is hereby directed to disburse the amount of money now on deposit with respect thereto as follows:

To: R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, \$3,640.00.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of said defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, in the principal sum of Seven Thousand Sixty and 13/100 Dollars (\$7,-060.13) together with interest thereon computed as follows:

(1) At 6% per annum on \$2,954.00 from July 1, 1950 until paid;

(2) At 6% per annum on \$2,954.00 from July 1, 1951 until paid;

(3) At 6% per annum on \$2,954.00 from July 1, 1952 until paid;

(4) At 6% per annum on \$1,838.13 from July 1, 1953 until paid,

Less the following credits for interest deductible by reason of deposits into Court:

(1) At 6% per annum on \$910.00 from July 17, 1950 until date of payment of judgment;

(2) At 6% per annum on \$910.00 from February 16, 1952 until date of payment of judgment;

(3) At 6% per annum on \$910.00 from May 28, 1953 until date of payment of judgment;

(4) At 6% per annum on \$910.00 from September 15, 1953 until date of payment of judgment;

that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of said deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or described in this cause of action has or had at the time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on July 17, 1950 on which date the declaration of taking herein was filed there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character of whatsoever the following described interest in and to the following described lands:

A term for years commencing July 1, 1950 and ending June 30, 1951, extendible for yearly periods

thereafter until June 30, 1955, at the election of the United States, notice of which election shall be filed in this proceeding at any time prior to the end of the term hereby taken or subsequent extensions thereof, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof any and all improvements and structures placed thereon by or for the United States in and to the following described property, to-wit:

Tract C-241A

The North Half and the North Half of the South Half of Section 19; all of Section 18; the East Half and the East Half of the West Half of Section 7; all except Lot 4 of Section 6; all in Township 13 North, Range 22 East of the Willamette Meridian; and the East Half and the East Half of the West Half of Section 31, Township 14 North, Range 22 East of the Willamette Meridian; all in Yakima County, Washington, containing 2,714.84 acres, more or less.

Tract C-259

The West Half of Section 12, Township 13 North, Range 21 East of the Willamette Meridian, Yakima County, Washington, containing 320 acres, more or less.

It Is Further Ordered, Adjudged and Decreed

that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,

Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HALL,

Assistant United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 762

UNITED STATES OF AMERICA,

Plaintiff,

vs.

6,868.22 ACRES OF LAND, more or less, in
Yakima County, Washington; et al.,

Defendants.

JUDGMENT ON VERDICT AS TO TRACTS

C-205, C-209 and C-219

The above entitled cause with which was consolidated for trial Civil Cause No. 892, No. 488 and No. 452 came on regularly for trial October 24, 1955, the plaintiff appeared by its attorneys of record, William B. Bantz, United States Attorney, and Ronald R. Hull, Assistant United States At-

torney, acting under and by direction of the Attorney General, and the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, appeared by their attorney, Walter V. Swanson. The defendant Yakima County, Washington, a municipal corporation appeared by the filing of its tax and assessment lien statement with reference to said Tracts C-205, C-209 and C-219 (in Civil proceeding No. 892).

The issues arising on the complaint for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 762.]

We, the Jury in the above entitled cause, find the value of the annual rental and severance damages for the leasehold taken (6,868.22 acres) to be \$7,240.00.

Leo Hake, Foreman

which said just compensation for the term October 28, 1952 to February 14, 1954, inclusive, as to Tracts C-205, C-209 and C-219, is computed at a total of Nine Thousand Three Hundred Seventy-One and 75/100 Dollars (\$9371.75); and

It appearing to the court that immediately prior to the commencement of said action on December 17, 1952 and thereafter to and including February 15, 1954 the fee simple title to said Tracts C-205,

C-209 and C-219 was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature;

Now, Therefore, the court having jurisdiction over each of the parties and of the subject matter herein and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth, to-wit, Seven Thousand Two Hundred Forty and no/100 Dollars (\$7,240.00), represents the fair annual rental value of the interest acquired by the United States commencing October 28, 1952 as to said Tracts C-205, C-209 and C-219, inclusive, together with the fair annual severance damage resulting therefrom; that the full true and reasonable amount of all compensation to be allowed to all persons whomsoever for all damages of whatsoever nature sustained by reason of the taking thereof for the term from October 28, 1952 through February 14, 1954, inclusive, is computed to be the sum of Nine Thousand Three Hundred Seventy One and 75/100 Dollars (\$9,371.75), and that the payment thereof as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the following are the only persons having any interest in the compensation to be paid for the taking of said estate in said lands and that said defendants are entitled to receive the whole of said compensation:

R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife.

It Is Further Ordered, Adjudged and Decreed that a judgment be and the same is hereby entered against the United States America and in favor of said defendants, R. H. Phillips and Jessie E. Phillips, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and R. R. Haggerty and Winnie Haggerty, his wife, in the principal sum of Nine Thousand Three Hundred Seventy One and 75/100 Dollars (\$9,371.75), together with interest thereon computed as follows:

(1) At 6% per annum on \$7,240.00 from October 28, 1952 until paid;

(2) At 6% per annum on \$2,131.75 from October 28, 1953 until paid;

that upon receipt of funds for the payment of such judgment the clerk shall without further order of the court pay said sum to said defendants in care of their attorney, Walter V. Swanson, Larson Building, Yakima, Washington, in full satisfaction of said judgment.

It Is Further Ordered, Adjudged and Decreed that none of the remaining defendants named or

described in this cause of action has or had at the time of the taking of said interest in said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that as of December 17, 1952, on which date the complaint in condemnation herein was filed, there vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever the following described interest in and to the following described lands:

A term for years commencing October 28, 1952 and ending on June 30, 1953, extendible for yearly periods thereafter at the election of the United States until June 30, 1957, notice of which election shall be filed in the proceeding at least thirty days prior to the end of the term taken or subsequent extensions thereof together with the right to remove within a reasonable time after the expiration of the term taken or any extensions thereof any and all improvements and structures placed thereon by or for the United States, subject, however, to existing easements for public roads, and highways, public utilities, railroads and pipe lines in and to the following described property, to-wit:

Tract C-205

All of Section 5, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 628.22 acres, more or less.

Tract C-209

All of Section 9, Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington, containing 640.0 acres, more or less.

Tract C-219

All of Sections 15, 17, 21, 27, 28, 29 and 33 in Township 14 North, Range 22 East of the Willamette Meridian, Yakima County, Washington.

Also, all of Section 20, Except the north half of the northeast quarter thereof; and all of Section 22, Except the north half of the northwest quarter thereof; all in said township and range, Yakima County, Washington, containing 5600.0 acres, more or less.

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,

Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HULL,

Assistant United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

In the United States District Court for the Eastern
District of Washington, Southern Division

Civil No. 892

UNITED STATES OF AMERICA,

Plaintiff,

vs.

33,213.13 ACRES OF LAND, more or less, situate
in the County of Yakima, State of Washing-
ton, and R. H. PHILLIPS and JESSIE E.
PHILLIPS, his wife; et al.,

Defendants.

JUDGMENT ON VERDICT

The above entitled cause with which was consolidated for trial Civil No. 488, No. 452 and No. 762 came on regularly for trial October 24, 1955, the plaintiff appearing by its attorneys of record, William B. Bantz, United States Attorney, Ronald R. Hull, Assistant United States Attorney, acting under and by direction of the Attorney General; and the defendants, R. H. Phillips and Jessie E. Phillips, his wife; R. R. Haggerty and Winnie Haggerty, his wife; D. Everett Phillips and Evelyn Phillips; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, and as Cold Creek Company, a partnership, appeared by their attorney, Walter V. Swanson. The defendant Northern Pacific Railway Company, a corporation, appeared through its attorneys of record and the

interest of said defendant Northern Pacific Railway Company was removed from trial herein and postponed for later determination by order of the court dated October 24, 1955. The defendant Shell Oil Company, a corporation, appeared through its attorneys of record by the filing of notice of such appearance, said defendant Shell Oil Company, a corporation, taking no part upon trial of said cause although having been duly and regularly served with process herein. Said defendants Laurent Regimbal and Jane Doe Regimbal, whose true name is Viola Regimbal, entered no formal appearance herein, either of record or upon trial of said cause although said defendants were duly and regularly served with process herein. The defendant Yakima County, Washington, a municipal corporation, appeared by the filing of its tax and assessment lien statement herein filed on March 2, 1954. The defendants Walter V. Swanson and Marjorie T. Swanson, husband and wife, entered no formal appearance herein, either of record or upon trial of said cause although said defendants were duly and regularly served with process herein.

The issues arising on the complaint for condemnation herein having been tried before the court and jury, the said jury returned its verdict herein on November 4, 1955 as follows:

[Title of District Court and Cause No. 892.]

We, the jury in the above entitled cause, find just compensation for the taking of defendants' property (fee ownership of 33,213.13 acres), in-

cluding severance damage to the remainder of defendants' ownership to be \$514,801.56.

Leo Hake, Foreman

It appeared to the court that immediately prior to the taking on February 15, 1954 of the lands hereinafter described, the fee simple title thereto was vested in the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife; R. H. Phillips, D. Everett Phillips and R. R. Haggerty, a partnership doing business as Phillips, Haggerty Livestock Company, free and clear of all liens, encumbrances, taxes, assessments, claims, rights or charges of whatsoever nature, except taxes and assessments due and owing to Yakima County, Washington, a municipal corporation, constituting a lien on said property as of said date of taking herein, in the sum of One Thousand Two Hundred Eighteen and 80/100 Dollars (\$1,218.80) and except the mineral rights, if any, of the defendant Northern Pacific Railway Company, a corporation, as aforesaid.

Now, Therefore, the court having jurisdiction of each of the parties and of the subject matter of the action and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the sum found by the jury as above set forth represents the fair market value of said property exclusive of the mineral interests of the Northern Pacific Railway

Company, and the full true and reasonable amount of all compensation to be allowed to all persons whomsoever, except as to said Northern Pacific Railway Company, for all damages of whatsoever nature sustained by reason of the taking thereof and that payment as hereinafter provided shall constitute full settlement of all claims against the United States of America arising out of such taking.

It Is Further Ordered, Adjudged and Decreed that the sum of Three Hundred Seventy One Thousand Seven Hundred and no/100 Dollars (\$371,700.00) paid as advance compensation pursuant to the order of court entered herein on February 16, 1954 be and it is hereby applied upon the aforesaid amount leaving a balance payable in the sum of One Hundred Forty Three Thousand One Hundred One and 56/100 Dollars (\$143,101.56); that the following are the only persons having any interest in the compensation to be paid for the taking of said lands and the clerk of the court is hereby directed to disburse the balance of the moneys now on deposit with the clerk of court in this cause with respect thereto as follows, to-wit:

To: R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, c/o Walter V. Swanson, Attorney at Law, Larson Building, Yakima, Washington, \$40,081.20.

To: Yakima County, Washington, a municipal corporation, c/o County Treasurer, County Court House, Yakima, Washington, \$1,218.80.

It Is Further Ordered, Adjudged and Decreed that a deficiency judgment be and the same is hereby entered against the United States of America and in favor of the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, in the principal sum of One Hundred One Thousand Eight Hundred One and 56/100 Dollars (\$101,801.56), together with interest thereon at the rate of six per cent per annum from February 15, 1954 until paid and that upon receipt of funds for the payment of such deficiency the clerk shall without further order of the court pay said sum to said defendants in care of their aforesaid attorney in full satisfaction of such deficiency judgment.

It Is Further Ordered, Adjudged and Decreed that except as to the interest of Yakima County, Washington, as aforesaid and except as to the mineral interest, if any, of the defendant Northern Pacific Railway Company, a corporation, none of the remaining defendants named or described in this proceeding has or had at the time of the taking of said property any right, title, estate, lien or interest in or to said property or any right to share in the compensation payable for the taking thereof.

It Is Further Ordered, Adjudged and Decreed that on February 15, 1954, there vested in the United States of America free and clear of any and all charges, interest, claims, rights, taxes, liens and encumbrances of any kind or character whatsoever the fee simple title in and to the following

described lands situate in the County of Yakima, State of Washington, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and pipe lines, to-wit:

EXHIBIT "A"

[Printer's Note: Attached Exhibit "A" is a duplicate of Exhibit "A" set out in full at pages 31-36 of this printed record.]

It Is Further Ordered, Adjudged and Decreed that the public use required the condemnation of the property hereinabove described.

Dated this 30th day of November, 1955.

/s/ SAM M. DRIVER,

Judge of the U. S. District Court

Presented by:

/s/ RONALD R. HULL,

Assistant United States Attorney.

Acknowledgment of Service attached.

[Endorsed]: Judgment Filed November 30, 1955.

[Title of District Court and Causes 892, 452, 488 and 762.]

MOTION FOR NEW TRIAL

Come now the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and Walter V. Swanson and Marjorie T. Swanson, his wife, and respect-

fully move the above entitled Court for a new trial for the following reasons:

1. Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court or abuse of discretion by which the losing party was prevented from having a fair trial.

2. Misconduct of the attorney for the prevailing party.

3. Error in law occurring at the trial.

4. Newly discovered evidence.

5. Substantial justice was not done.

In particular the errors in law occurring at the trial relied upon are:

1. Argument of counsel for the condemnor that the jury had the right to consider the profit in condemnees' purchase as a yardstick of value, and the ruling of the Court in the affirmative over objection.

2. For sustaining objections to testimony of value of gross product of the land in dollar sales.

3. In excluding exhibits numbered 120, 96 and 97, and in excluding said exhibits from consideration by the jury in each of the four consolidated cases separately.

4. In excluding testimony offered by way of proof:

- (a) That the area was a probable area for exploration by a competent witness and by the same witness that a number of companies actually leased the surrounding areas for varying values.

- (b) That under such circumstances landowners' mineral rights have a market value.

(c) That landowners' mineral rights have a rental value as a portion of the highest and best use of the land.

5. In invading the province of the jury by making findings of fact with regard to offered proof of increase in value to the fee by reason of the existence of mineral rights in a probable area, and by making a finding of fact contrary to the contention of the defendants that the leasehold use of the land had an increased value for exploration rights.

6. In affirmatively ruling prior to instruction that no instructions would be considered or given with relation to mineral rights or exploration therefor, notwithstanding the fact that actual testimony of \$2.00 per acre is contained in the record.

Newly discovered evidence of transfer and dealing in mineral rights.

/s/ WALTER V. SWANSON,

Attorney for said Defendants

Acknowledgment of Service attached.

State of Washington,
County of Yakima—ss.

R. W. Slemaker, Jr., being first duly sworn, on oath deposes and says:

That I am in the business of purchasing mineral rights. I am associated with my father in the company, and we are the owners of mineral rights in approximately 29 states. We acquire all or a portion of the landowners' mineral rights in areas

which have not been explored by drilling, past or present, and particularly desire to obtain mineral rights in areas in which major oil companies are commencing leasing operations. Our company is wholly unconcerned as a matter of business practice whether an area is explored or not or whether the value of minerals in the ground has been proven or not for the reason that rental for exploration right is a major source of the income of our company; for example, in Yakima County leasing of mineral rights to major companies is now returning to the landowners' mineral right varying income from 25c per acre per year to \$1.00 per acre per year. In event of exploration showing no value to mineral right, then such leasing of course ceases, at least until major oil company interest is aroused again in the area. Leasing of mineral rights continues for as long as twenty years in some areas by successive companies prior to development or failure to develop actual oil or gas resources. Of course in those particular areas where actual discovery happens, mineral rights become extremely valuable in the area involved.

My company is attempting to purchase an interest in mineral rights up to 15,000 acres in Yakima County as a first block. Mineral rights are very difficult to purchase and I have not completed my commitment in three weeks of effort here in Yakima. I have arranged for the purchase of a portion of the mineral rights of Shirley Ward in Townships 12, 14 and 15, Range 17, in Yakima County, at \$1.00 per acre for a half interest. I am

negotiating and willing to purchase other acreage to the amount stated at the same rate.

/s/ R. W. SLEMAKER, JR.

Subscribed and Sworn to before me this 1st day of December, 1955.

[Seal] /s/ DOUGLAS A. WILSON,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Causes 892, 452, 488
and 762.]

ORDER DENYING DEFENDANTS' MOTION
FOR NEW TRIAL

The above entitled causes, being Civil No. 892, 452, 488 and 762 consolidated for trial, having come on before the Court upon Motion for New Trial interposed by the defendants, R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, D. Everett Phillips and Evelyn Phillips, his wife, and Walter V. Swanson and Marjorie T. Swanson, his wife, and the court having heard and considered argument of counsel and being fully advised in the premises,

It Is Hereby Ordered that the Motion for New Trial of said defendants, be and the same is hereby denied.

Dated and Done in Open Court this 6th day of
January, 1956.

/s/ SAM M. DRIVER,

Judge of the U. S. District Court

Presented by:

/s/ WILLIAM B. BANTZ,

United States Attorney

/s/ RONALD R. HULL,

Assistant United States Attorney

Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause No. 452.]

NOTICE OF APPEAL

Notice Is Hereby given that R. H. Phillips and
Jessie E. Phillips, his wife, R. R. Haggerty and
Winnie Haggerty, his wife, and D. Everett Phillips
and Evelyn Phillips, his wife, defendants above
named, hereby appeal to the United States Court
of Appeals for the Ninth Circuit from the final
judgment entered in this action on the 30th day
of November, 1955, and from the order denying new
trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,

Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 488.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips, also known as D. Everett Phillips, and Evelyn Phillips, his wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 762.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of

November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause No. 892.]

NOTICE OF APPEAL

Notice Is Hereby Given that R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, individually and in behalf of the Cold Creek Company, a partnership composed of the foregoing defendants, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of November, 1955, and from the order denying new trial entered on the 6th day of January, 1956.

/s/ WALTER V. SWANSON,
Attorney for all said Appellants

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Causes 892, 488, 452 and 762.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the originals filed in the above consolidated causes called for in Appellant's Designation filed on March 14, 1956, and in Appellee's Designation filed on March 23, 1956,

Complaint in Cause No. 892.

Letter from Attorney General authorizing filing of case, No. 892.

Declaration of Taking, Cause No. 892.

Motion for Order for Delivery of Possession, No. 892.

Order for Possession, No. 892.

Affidavit of Mailing Order for Possession.

Petition for payment of advance compensation, No. 892.

Government Exhibits No. A through Y, inclusive, Title Certificates, No. 892.

Order for advance compensation, No. 892.

Notice of Lis Pendens, No. 892.

Tax and Assessment Lien Statement, No. 892.

Notice and Marshals returns on notice, No. 892.

Appearance of Dean H. Eastman for N. P. Ry. Co.

Stipulation extending time to plead or take other action, No. 892.

Appearance of Patton, Coye and Radford for Shell Oil Company, No. 892.

Petition for Dismissal of Mineral Rights from Condemnation Proceedings, No. 892.

Order denying petition for dismissal of Mineral Rights, No. 892.

Motion for Summary Judgment as to defendant, Northern Pacific Railway Co., No. 892.

Stipulation continuing hearings on motion for Summary Judgment and issue of compensation of Northern Pacific Railway Co., No. 892.

Order approving stipulation.

Motion and affidavit for continuance of trial.

Disclaimer of Laurent Regimbal, et ux.

Order consolidating causes for trial: Nos. 892, 452, 488 and 762.

Order on stipulation, excluding determination of mineral rights of N. P. Ry. Co. from trial.

Plaintiff's Proposed Instructions to Jury.

Copy of computation of experts' value testimony submitted to the jury on stipulation of parties.

Verdict of Jury, No. 892.

Petition for Condemnation, No. 488.

Motion and affidavit for Order granting right of possession, No. 488.

Order for Possession, No. 488.

Letter from Attorney General authorizing filing of case, No. 488.

Declaration of Taking, No. 488.

Order on Declaration of Taking, No. 488.

Affidavit of Mailing Order on D. of T., No. 488.

Affidavit of Mailing Order for Possession, No. 488.

Lis Pendens, No. 488.

Notice of Election to Extend Term to June 30, 1952 Tracts C-241-A, C-243, C-246, C-258, C-259, C-264, C-275, C-279, C-280 and C-281.

Notice of Election to Extend Term to June 30, 1953 same tracts.

Notice of Election to Extend Term to June 30, 1954 Tracts C-241-A and C-259.

Affidavit of Mailing Notice of Election Tracts C-241-A and C-259.

Copy of computation of experts' value testimony submitted to the jury on stipulation of parties, Tracts C-241-A and C-259, No. 488.

Verdict of Jury, Tracts C-241-A and C-259, No. 488.

Petition for Condemnation, No. 452.

Letter from Attorney General authorizing filing of case, No. 452.

Declaration of Taking, No. 452.

Order on Declaration of Taking, No. 452.

Affidavit of mailing Order on D. of T.

Lis Pendens, No. 452.

Notice of Election to Extend Term to June 30, 1951.

Notice of Election to Extend Term to June 30, 1952.

Notice of Election to Extend Term to June 30, 1953.

Notice of Election to Extend Term to June 30, 1954 Tracts C-240 and C-241, No. 452.

Affidavit of mailing Notice of Election Tracts C-240 and C-241, No. 452.

Copy of computation of experts' testimony submitted to jury on stipulation of parties Tracts C-240 and C-241, No. 452.

Verdict of Jury, Tracts C-240 and C-241, No. 452.

Complaint in Cause No. 762.

Letter from Attorney General authorizing filing of case, with attached Exhibits No. A, B, C and D, No. 762.

Lis Pendens, No. 762.

Notice and Marshal's returns of service.

Notice of Election to Extend Term to June 30, 1954.

Affidavit of Mailing Notice of Election.

Application for setting case for trial, No. 762.

Copy of computation of experts' testimony submitted to the jury on stipulation of parties, No. 762 Tracts C-209 and C-205 and C-219.

Verdict of Jury, Tracts C-209, C-205 and C-219.

Reporter's Record of Proceedings at the trial of consolidated cases No. 892, 488, 452 and 762.

Judgment on Verdict, No. 892.

Judgment on Verdict, No. 488, Tracts No. C-241A and C-259.

Judgment on Verdict, No. 452, Tracts No. C-240 and C-241.

Judgment on Verdict, No. 762, Tracts No. C-205, C-209 and C-219.

Motion to Amend Judgment on Verdict, No. 762.

Order Amending Judgment on Verdict, No. 762.

Motion for New Trial, Consolidated Nos. 892, 488, 452 and 762.

Order denying motion for new trial.

Affidavit of mailing Order denying motion for new trial.

Petition for Payment of Advance Compensation No. 892.

Order directing payment of Advance Compensation No. 892.

Petition for payment of Advance Compensation No. 488.

Order directing payment of Advance Compensation No. 488.

Petition for payment of Advance Compensation No. 452.

Order directing payment of Advance Compensation No. 452.

Petition for payment of Advance Compensation Consolidated Nos. 892, 452, 488 and 762.

Order directing payment of Advance Compensation Consolidated Nos. 892, 452, 488 and 762.

Notice of Appeal, No. 892.

Notice of Appeal, No. 488.

Notice of Appeal, No. 452.

Notice of Appeal, No. 762.

Designation of Record on Appeal, Consolidated Nos. 892, 452, 488 and 762.

Statement of Points on Appeal, Consolidated Nos. 892, 452, 488 and 762.

Appellee's Designation of Record on Appeal
Consolidated Nos. 892, 452, 488 and 762.

Order Extending Time to file and docket Record
on Appeal to and including May 31, 1956.

Motion for Bond for Costs on Appeal.

Order for Bond for Costs on Appeal.

Bond for Costs on Appeal.

Stipulation to eliminate certain exhibits from
Record on Appeal.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court at
Yakima in said District this 28th day of May, 1956.

[Seal]

STANLEY D. TAYLOR,
Clerk

/s/ By THOMAS GRANGER,
Deputy

In the District Court of the United States for the
Eastern District of Washington, Southern Division

Consolidated Cases Civil Nos. 892, 488, 452, and 762

United States of America, Plaintiff,

vs.

33,213.13 Acres of Land, more or less, situate in
the County of Yakima, State of Washington,
and R. H. Phillips and Jessie E. Phillips, his
wife, et al, and Ragnar L. Arneson, R. H. Phillips
and Jessie E. Phillips, his wife, et al, and
R. R. Haggerty, et al, and 6,868.22 Acres of
Land, more or less, situate in the County of
Yakima, State of Washington, R. H. Phillips,
et al, Defendants.

RECORD OF PROCEEDINGS AT THE TRIAL

Yakima, Washington, October 24, 1955, 10
a.m. [*]

* * * * *

Mr. Hull: I do have two maps which we might
get identified.

Mr. Swanson: These maps counsel wishes to use
in his opening statement and I have no objection,
your Honor.

The Court: Having had time to think it over
overnight, I am still quite disturbed, and I think
counsel is a little worried, too, about this mineral
rights situation.

* Page numbers appearing at foot of page of original Reporter's
Transcript of Record.

I don't want to deprive an owner of making a showing of anything in which he is entitled to compensation on a finding of the jury, but at the same time I think it would be tragic to seriously jeopardize a big verdict here by the Court's submitting something that shouldn't properly go to the jury. Of course, if it is a large and favorable verdict for the land owner, it is within the realm of—I will not say possibility, but perhaps probability that the government would appeal, because there is a great deal involved here and an appeal to the Court of Appeals at best means about a two year delay, a lot of expense for somebody getting the record up there, and if error is found, a new trial beginning all over again about two years from now. [66]

So I have examined the authorities that Mr. Hull submitted to me and I think they bear out his contention that unless the land is a proved field or reasonably adjacent to a proved field, which isn't the situation here, that mineral values, as such, cannot be made the basis of compensation, unless there can be shown reasonable probability that they exist there. And, having been through these cases before, I don't think it is possible to show reasonable probability of gas and oil values under these lands.

Now, I think in a prior case I did submit the rather tenuous proposition that the jury could find how much the market value of the land had been enhanced by the possibility of leasing it for exploration purposes, but, frankly, I am getting a little concerned about that and doubtful about it. I can't

see how as a practical matter you could prove how much the possibility of leasing for exploration would enhance the market value of this land unless you could show how much is paid by oil companies for leases, and then you get back to the proposition of putting in these leases and the amount that the owner would get for exploration leases, which I think is clearly improper because it is too speculative.

Now, I am just voicing my concern here at this early stage so that if Mr. Swanson has any [67] cases here or my authorities that can bear out the proposition or the question of whether there is a value there, a market value or enhancement of market value by reason of the possibility of leasing it for exploration, I would like to have them submitted so that I can have the benefit of them before we reach that point. It probably won't finally be reached until Mr. Swanson's case or perhaps when it comes time to instruct the jury.

Mr. Swanson: As you know, I have done a great deal of research on that and there does not seem to be cases in Federal Court on the point, your Honor, excepting the general law that all matters concerning value should be translated that are capable of being translated into value should come before the jury and should be the subject of an award, and that is the reason why I was directed to and I did move for a separation of the mineral rights from this verdict, for many reasons. If the government wants to appeal, for instance, and it takes two years and they should fail in their appeal and there is a

verdict on the amount which we claim and I believe we will prove the value is in this, they lose 6 per cent per year, which is a large amount of money. It will run more than \$100,000 to \$200,000 in this amount which we feel that we can surely prove here.

So it is a two-headed sword and that is why I felt it was to the advantage of the government [68] and to the land owner to suspend all mineral rights, not just those of the Northern Pacific, and I have a motion in to that effect. This Court can hardly be expected to take the burden of that type of a tenuous situation, and I believe it is, too, your Honor, and that is the reason I brought it up, and tack it on to a heavy case which burdens both the government and the land owner, when it could be separated, and I feel that failure of the government to agree to accede to that is by reason of failure to realize the facts of the situation.

Mr. Hull: With reference to the comments the Court has made about the submission of evidence which could be entertained as to mineral values in this case, as I mentioned yesterday, I still can't see that we are not bordering dangerously on the question of anticipated future profits. I agree wholeheartedly that nobody wants any error in this case, and if it is possible for us to find any further citations, we will submit them.

The Court: Well, I assume that probably there isn't any directly in point.

Mr. Hull: I could find no others.

The Court: I haven't been able to find it.

So far as the separation of value, of course, the

general rule, as we all concede, is that the valuation of leased real property taken for public use [69] should be as a whole, as a unit, although I think that where different elements of value are present and are not inconsistent, they could be separated on stipulation. I think that is borne out in some of the cases that I just read this morning. Here, I take it, the exploitation of mineral value would not be inconsistent with agricultural value, because you could drill oil wells——

Mr. Swanson: That's right.

The Court: ——and take the oil and gas off and still use it without any substantial reduction in value for stock raising purposes. There are other things that would be inconsistent. You would have both uses.

But so far as the stipulation is concerned, I appreciate Mr. Hull's situation because I worked for the government quite a long time myself and I don't suppose he would have authority to stipulate here without getting authority from Washington, and it is a little late for that with the jury trial already started.

Mr. Swanson: Well, your Honor, there is nothing personal. I know personally Mr. Hull would very much like to do this, and he has tried and it is true that he has no control over it.

The Court: I just simply mentioned that to show the practical situation here.

All right, you can bring in the jury, then. [70]

Mr. Hull: If the Court please, am I correct in believing that the order of consolidation of the four cases has been entered?

The Court: Yes, I have signed that.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: I think the record should show that the jury view of the premises having been completed, all the jurors are back in the court and, so far as I can determine at least, in reasonably good condition.

You may proceed, then. [71]

* * * * *

C. MARC MILLER

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

By Mr. Hull:

Q. Mr. Miller, where do you live and what is your occupation?

A. I live in Seattle, Washington and I am [278] a real estate broker and appraiser.

Q. What is the name of your firm and company?

A. The Pacific Northwest Land Company is my real estate brokerage business. My appraisal business is operated under the name of C. Marc Miller & Associates.

Q. How long have you been in that business, Mr. Miller?

A. Since 1928, and I have been a real estate broker continuously since then.

Q. How long in Seattle?

A. I moved to Seattle in 1931, having started in the real estate business in Port Townsend on the

(Testimony of C. Marc Miller.)

Olympic Peninsula. I have maintained an office in Seattle continuously since 1931. However, in 1934 I also had an office in Eastern Washington in Grant County and I maintained an office in Grant County from 1934 until 1938, when I moved my Eastern Washington office to White Bluffs, which was within the Hanford Project but what later became the Hanford Project. I had my office in White Bluffs from 1938 until 1943, which was the inception of the Hanford Project when the government acquired the land there.

Q. Do you also, in addition to the operation of your brokerage business and real estate business, own land yourself?

A. Yes, I have owned land in Grant County and in Chelan [279] County and Benton County in Eastern Washington.

Q. What type of land was it and how much of it?

A. It is business property in Wenatchee and a part of an orchard there. I owned dry land farmland in Benton County. I owned land in Grant County which was wheat land that was recently sold. I now own an irrigated farm in Grant County. My land in Benton County is range land. At one time, I should say, I owned considerable land in the Priest Rapids Irrigation District in the Hanford area.

Q. You say you owned some land in Benton County?

A. Yes, sir.

(Testimony of C. Marc Miller.)

Q. Is that anywhere near the Phillips-Haggerty tract?

A. It corners the southeast corner of the Phillips and Haggerty property.

Q. And approximately how many acres is your ownership there?

A. There is about 1,200 acres left in that ownership.

Q. Is that range land? A. Yes.

Q. Then you have been familiar with and operated on land in Eastern Washington over quite a few years? A. Over 20 years.

Q. What familiarity have you with the firing range area in particular? [280]

A. I volunteered for the Corps of Engineers in the spring or in the early winter of '42—I mean really the late winter of '42-'42—and was placed in charge of the Real Estate Division for the Army for this area at that time, and my very first job was to come to Yakima to arrange for the acquisition of the Yakima Artillery Range at that time in 1942.

Q. Were you a full-time employee of the government at that time?

A. Yes, that's right, I was.

Q. For what period of time?

A. From 1942 in about February of that year until April of 1943.

Q. Are you now or have you since that time been an employee of the government as a full-time basis?

A. No, that is my only employment with the government.

(Testimony of C. Marc Miller.)

Q. I see. What experience have you had in the field of appraisement of real estate?

A. Well, I have appraised land, my first appraisal was in 1930. I have in the last 10 years devoted my entire time to the appraisal of real estate. My real estate activity has been a specialty entirely in the field of farm and ranch business. I have limited my appraisal work to that appraising too of farm and ranch land. It has not been limited to the State of Washington, but [281] principally in the State of Washington.

Q. I see. And when you speak of farm and ranch land, what type of farming?

A. Both irrigated and dry land farming.

Q. And ranching, you mean stock raising?

A. Yes, sir.

Q. Cattle? A. Uh-huh.

Q. Have you appeared as an expert witness in condemnation cases before?

A. Yes, I have in both the state courts and the Federal Courts for both the land owner and for the government, and for the State of Washington and for the City of Seattle, for King County, for Jefferson County, and for the City of Port Townsend.

Q. Do you belong to any professional organizations?

A. I belong to the American Society of Farm Managers and Rural Appraisers.

Q. Now, are you familiar with the land, the

(Testimony of C. Marc Miller.)

subject of this case know as the Phillips-Haggerty tract?

A. Yes, sir, I have been. I have known the Rothrock part of the ownership probably longer than the other land in that I was on that Rothrock land as early as 1939 or '40 when we had the property for sale.

Q. Referring to Map No. 5, what portion [282] of the Phillips-Haggerty tract does that represent?

A. The Rothrock ownership is the northern part of the property ranging north of the Umtanum Ridge, the ridge running generally southeasterly-northwesterly through the tract. The Rothrock ownership contains slightly over 15,000 acres of ground in the northern end, including the present land which is marked in purple on here.

Q. You say you had that Rothrock ownership listed for sale at one time yourself?

A. Yes, sir.

Q. What year or years was that?

A. Well, we had it for sale up to the time when it was purchased by Phillips and Haggerty.

Q. Did you handle that transaction?

A. No, sir, had nothing to do with that.

Q. Then when did you first go on to that Rothrock portion?

A. I went on to that property either '30 or '40 and drove up to Priest Rapids, which is in Section 3 along the river, and Brown Brothers and Sisk were operating the Rothrock Ranch at that time and had their headquarters there and their irriga-

(Testimony of C. Marc Miller.)

ted farm land at that point, and from that point either Wynn or Russ Brown, I am not sure which now, but one of the Brown Brothers and I rode by horse up over part of this range and went up to Buffalo Springs and came down Sourdough [283] Canyon.

Q. I see. As to the portion portions of the Phillips-Haggerty ownership, the Coffin and Bailey places, when did you first see them?

A. I first went on the Coffin ownership in I believe it was 1942 or '3 or '4. I am not sure, it is just about the time when the government acquired the lower land and it was the time that Coffin was offering the property for sale.

Q. Did you have anything to do with that?

A. I had nothing to do with the sale. However, it was a general listing and I called upon the Coffins many times regarding the sale of this property and went on the land at that time.

Q. I see. Since the early 40's that you have spoken of, have you been out on the land of the Phillips-Haggerty tract since?

A. I have been on parts of it since.

Q. What portions?

A. I was up at the upper part, oh, through the latter 40's and drove down as far as the ranch headquarters and back. I don't believe I was on any part of the other ranch until this year, although I might have gone into the lower end of it, but I don't remember.

(Testimony of C. Marc Miller.)

Q. This year, did you have occasion to go back onto the Phillips-Haggerty property? [284]

A. Yes.

Q. And to what extent did you cover it?

A. Went back there for the purpose of making an appraisal and I again went over the entire ownership as well as I could. That is, I haven't set foot on every foot of it, but I have been over all of the roads there and up to the water holes, inspected the buildings and improvements on the property.

Q. Will you tell us now just in general terms the aspect of the Phillips-Haggerty Ranch as you saw it?

A. The land is much as it was in the past, there has been very little change, excepting there is more land in cultivation now than when Mr. Coffin owned it. The Coffin part of the ownership is still enclosed in the fencing as it was then. The Bailey fencing is around the Bailey ownership. The Rothrock ownership has a fence along the west end, which I think is a better fence than was there before and probably is a newer fence. The road through the property now, of course, is a much improved road than the one that I had to travel to get into the property before.

Q. You are speaking of the Cold Creek Road?

A. The Cold Creek Road, yes. The land appears to be in good condition, the range is good. I noticed particularly along the north slope of both the [285] Yakima and the Umtanum Ridge considerable grass forage. The western part of the range, being the

(Testimony of C. Marc Miller.)

higher part, is the better part and is a good range.

Q. What as to the balance of the range land to the east?

A. Well, this property in the southeast corner as you go down Cold Creek gets to a lower elevation with less precipitation. It has principally sage brush and cheat grass. That continues all down the Cold Creek draw continually getting worse as it gets down below. The eastern end of the Rothrock range runs down to an elevation of approximately 600 feet in the ownership here and is quite gravelly, open soil, covered mostly by a small amount of grass and some sage brush.

Q. When you first came to know these properties, for what purpose were they being operated, that is, what use were they being put to?

A. Brown Brothers and Sisk ran cattle over the Rothrock part of the ownership.

Q. You speak of some irrigated land, is that anywhere within the Phillips-Haggerty area of taking?

A. No, sir, the headquarters for that operation was off of the ownership down on the river and received water for irrigation from the diversion canal of the Priest Rapids Irrigation District. They wintered all of their stock down there and fed all of their stock down there, [286] and that was a cattle operation.

The Coffin operation had principally been sheep. Forrest Winner had operated it as a sheep ranch

(Testimony of C. Marc Miller.)

and Coffin inherited through the Winner estate and continued to operate as a sheep ranch.

Q. From your observation of the entire ownership of some 36,000 acres now, your experience and from your judgment, what as of the date of taking in this case in the month of February, 1954—I am speaking now of the taking of the fee——

A. Yes, sir.

Q. ——what was the highest and best use of that property?

A. Well, in my judgment, the highest and best use of the tract of ground, the entire ownership, would be as a cattle or sheep range. It has some benefits for sheep and it has others for cattle. The lower ranges have considerable browse that cattle won't use but sheep will, but I would judge as a cattle ranch, it would be good or as a sheep ranch.

Q. Would it be possible to use it as a year around range within certain limits?

A. Oh, yes, it would be possible, but it is lacking in high range and it is questionable to me whether there is enough cultivatable land there to produce enough hay to handle the cattle through the winter. However, I [287] assume that if all the cultivated land here is put into hay, that you could produce enough to winter and operate this as a year around operation.

Q. If that were done, what do you think the carrying capacity of the range would be?

A. Well, my judgment on there would be be-

(Testimony of C. Marc Miller.)

tween 800 and a thousand head, and I have used for my figure, however, a thousand head on here.

Q. When you made your statement about the raising of hay on the area there along Cold Creek, do you mean just on the crop land that has been broken out as of now?

A. Well, of course, there is possibility of additional land there to be broken out. It could be done. If I was making any suggestion, that was one of the things I would suggest that they do, put all of it to hay and break out some more land to hay.

Q. Where would this potential crop land appear?

A. I think continually to the west from the present operation towards the break between Selah Creek and Cold Creek where the creeks originate. There is considerable level land there, keeping also in mind that you must have equipment, you must be close to your headquarters, and that would be a continuation of your area in here.

Also, I say for hay in that, if you notice, the very spotted nature of this crop land in field. [288] They get down to very small fields, 9 acres, 8 acres, 12 acres, in a wheat area, and these gentlemen, I know, are wheat farmers, but I think they will agree that most farmers in wheat land wouldn't bother with that small acreage, but in this area it becomes of value because you can raise hay in there and that is why I think it is of a greater value to this ranch as hay land rather than wheat land.

Q. If you did not raise hay for feed on that

(Testimony of C. Marc Miller.)

crop land, what would you have to do with your cattle or sheep?

A. Have to take your cattle off of there and remove them.

Q. For about how many months of the year?

A. I think all of the entire winter months, and that would be, depending upon your season, but I would think from November or later until probably the last of February, into March, three or four months, anyway.

Q. Would it be feasible to bring in the feed?

A. Oh, yes, surely, but that gets to be an expensive operation and it is a matter of whether it is economic to do so or not.

Q. From your estimation, then, would it be profitable to devote all of that——

Mr. Swanson: Now, counsel objects to my mention of the word "profit" any time I use the word "profit." Now he is going into the profit here, would it be profitable, would [289] it be economic. I except to it and I ask that it be stricken, your Honor.

The Court: I think the objection will be overruled. He can give his reason, he is telling why he thinks that is the highest and best use.

Mr. Hull: I will reframe my question.

The Court: All right.

Mr. Hull: To avoid any mention of profit. I don't have that in mind at all.

Q. But in the sense that we are talking about highest and best use, then, would the highest and

(Testimony of C. Marc Miller.)

best use be to use that entire crop land area, potential and what is under cultivation, for raising wheat?

A. Well, if you would do that, your ranch would be so out of balance that your range land would not have the value that it has attached to an operation which has feed for winter there.

Q. I see. Now, did you find any crop land under cultivation in the northern or Rothrock area?

A. No, sir.

Q. Do you consider in your opinion that there is any crop land potentially usable in that area on the basis of what you have previously stated?

A. There is land at the lower toes or foothill of the Umtanum Ridge which would lend itself and the soil is so [290] you could raise grain, similar to this, but it is very small, I mean the areas are very small, and you are removed from your operation and the access to it is over a very windy, steep mountainous road to take equipment from your ranch over. I don't think it would be a practical operation to put one in there.

Q. From your observation, how many acres would you state there are in crop land or were as of February, 1954 under cultivation?

A. Well, I estimated that to be a thousand acres of ground. It is slightly over that after I checked with the aerial photos which were furnished me which showed the fields I had walked over. It broke out to be a 1,034 and a fraction acres, I believe, but I had used a thousand acres of ground roughly.

(Testimony of C. Marc Miller.)

Q. Did that figure coincide with your own observation on the ground? A. Yes, sir.

Q. Your own estimate?

A. It was slightly more than I had figured. I had roughed it out at approximately a thousand acres.

Q. From your observation, how many acres of potential crop land would you say there exists to the west along Cold Creek?

A. Well, Mr. Hull, I made no estimate of that. There are [291] several reasons for not making an estimate of that.

Q. Why did you not?

A. I have handled the sale of this kind of range land for a number of years, and although owners, purchasers, buyers, have gone over an area like this and said, "Well, I think there is some additional land there," when they buy the land and when they negotiate for it, they pay for it as is. If there is something additional, they don't pay anything additional for it. It is not figured in the appraisal or the negotiations or the price on the property.

Q. I see.

A. As evidence, the sale of the very property itself, although there was land in cultivation on the Coffin Ranch, it sold and the negotiations were on a straight price, straight through per acre.

Q. I see.

A. No difference in value for the range land or for the crop land or for the different kind of range

(Testimony of C. Marc Miller.)

land, and practically all of your ranges are sold that way.

Q. Now, from your observation and experience and familiarity with this type of ownership in the state, are there other ranch layouts similar to this in size in the vicinity?

A. Yes, there have been and there and I [292] made a check of them and I knew of some. I think particularly in keeping on comparable sales, you should stay as close as you can to something that is comparable, and I think if we continue along the breaks of the Columbia River, we will have a very comparable sale and that is the sale from Coffin Brothers to Dilling of somewhat over 40,000 acres of ground between the Vantage Bridge and Wenatchee on the west side of the river.

Now, there were several things in that sale that you should be apprised of. That land ran from an elevation of approximately 600 feet to 6,000 feet. In its higher regions it had timber on it. The timber had been negotiated for and reserved, therefore leaving only the land and the range.

Q. Pardon me, sir, but what was the year of that transaction? The date, rather?

A. That was August 31, 1951, and there was 40,049.34 acres. It sold for \$6.50 per acre.

Mr. Swanson: How many acres?

A. Pardon?

Mr. Swanson: How many acres?

A. 40,049.34.

Q. (By Mr. Hull): 40,049?

(Testimony of C. Marc Miller.)

A. Yes, sir. The full consideration was \$240,296.

Q. And you compute the price per acre at what?

A. Pardon, sir?

The Court: The price per acre?

A. \$6.50 per acre.

Q. (By Mr. Hull): Thank you.

A. There was one other provision that you should be apprised of. Coffin Sheep Company owned quite a band of sheep. The Dilling people were not going to run sheep on there, they intended to lease it. They agreed to lease for the next three years the range to the Coffins at the going price for range land at that time.

Q. I see.

A. So although the sale was a sale, a cash sale completely across the board, the lease to the seller was for the same price as anyone else would pay for the range.

There was also in that area about 1,600 acres of crop land.

Q. You have been on this tract?

A. Yes, sir, we had the property for sale.

Q. Sir?

A. We had the property for sale by Coffin.

Q. I see.

A. That was not an exclusive listing, that was a general listing.

Q. You had been on the property and talked to the principals? [294]

A. Yes, sir.

Q. There were 1,600 acres of crop land included?

A. Approximately 1,600. There was slightly less

(Testimony of C. Marc Miller.)

than 2,000 acres of crop land. It might have been 1,800.

Q. And were there any improvements?

A. Improvements were minor. There was a house and a headquarters and there was some leased land there, but the buildings were minor on there.

Q. Were the improvements at all comparable as to that land and the Phillips-Haggerty tract improvements?

A. No, the Phillips and Haggerty buildings, although they are old, are very usable and adequate for the other operation on there. The buildings were not as good as Phillips and Haggerty, though.

Q. And did you arrive at any breakdown of the valuation placed by the principals in that sale as to the crop land?

A. No, sir, the only breakdown that was ever discussed was the fact that they paid \$6.50 an acre straight through, crop land and all.

Mr. Swanson: Discussed by you?

A. Yes, sir, discussed by me with the sellers of the property.

Q. (By Mr. Hull): I will ask you, is that a common or uncommon method of arriving at the sale? [295]

A. That is the most common method used of large range land areas. The other example of when it is not used is the sale of the Savage Bar 14 Ranch at Ellensburg, which is comparable in a different way to this property, but in that it runs a thousand

(Testimony of C. Marc Miller.)

head of cattle, but it has irrigated land attached to it which produces feed for that.

Q. When was that property sold?

A. September 15, 1955.

Mr. Swanson: If your Honor please, now I believe the rule is that these are sales on contract or for cash and cannot be traced and involve trades. I think that Bar 14 counsel knows is that type of a transaction, trades for property in San Diego and San Francisco and relative bargaining that we don't know anything about here.

A. I think you are mistaken, counsel.

Q. (By Mr. Hull): Is that true, Mr. Miller?

A. My understanding is that the property was transferred for cash.

Mr. Swanson: That is your testimony?

A. Yes, sir, from Mr. Savage, the seller.

Q. (By Mr. Hull): You talked to Mr. Savage?

A. We had the property for sale, sir, we were paid a commission out of the sale of this property.

Q. Then, you are in possession of material facts, are you [296] not?

A. In so far as the transfer, yes. There was a previous deal that maybe counsel is referring to in which a trade had been offered for this involving property in San Francisco and San Diego, but that deal was not made. We had been negotiating for that in our office in Seattle, but it was not completed.

Q. Where is this ranch, this Savage Ranch, located?

(Testimony of C. Marc Miller.)

A. The Savage Ranch is located in the Ellensburg Valley to the north and east of Ellensburg, approximately—well, there is two different areas that are not contiguous. I would say about 8 to 10, 12 miles northeast of Ellensburg.

Q. And how many acres involved?

A. There were 6,300 acres of range land, a thousand acres of irrigated land, or a total of 7,300 acres of land.

Q. Now, you have been over that property, then?

A. Yes, sir.

Q. You are well familiar with it. What improvements were included in the transaction or other considerations?

A. Well, it was a very substantial ranch. We prepared quite a sizeable brochure on it involving six pages. The buildings were insured and equipment was insured for over \$130,000. The properties included a big ranch house, a large caretaker's or Manager's house, four [297] houses for help, large barns, corrals. It was a very substantial ranch.

Mr. Swanson: Well, I move this property be not considered, then. Your Honor, this isn't the kind of a property that we are concerned with here. We are not concerned with \$100,000 worth of improvements, a big dude ranch, which this was.

Mr. Hull: I think I may by opportunity to further examine bring out where the comparability comes in, your Honor.

The Court: Very well.

Q. (By Mr. Hull): I think you mentioned a lit-

(Testimony of C. Marc Miller.)

the while previously that you were referring to this ranch particularly because of carrying capacity, is that correct?

A. Yes. A cattleman looking for a place to operate for a thousand head of cattle has a limited number of places where he can find that. There are two ways of operating, either on a great deal of range land with some winter feed or on range land and some cultivated alfalfa or irrigated pasture. The trend in the last few years has been to the irrigated pasture. Most of the cattlemen have moved to irrigated pasture.

When the cattleman is thinking of buying land, he is thinking of having an area that will support so [298] many head of cattle and the most economical way of doing that, and they have found the most economical way is to have irrigated pasture in connection with their range, and so in my judgment this is very comparable in that it supports the same number of head as this property could probably support.

The Court: When was this sale? I didn't get that.

A. September of this year, sir.

The Court: September, 1955. Where is it?

A. It is in Ellensburg.

The Court: I see. All right, go ahead.

Mr. Swanson: To whom?

A. To L. A. Manly.

The Court: What was the acreage, Mr. Miller?

A. 7,300 acres, I believe.

(Testimony of C. Marc Miller.)

The Court: Well, all right, go ahead.

Q. (By Mr. Hull): What do you compute the selling price?

The Court: Pardon me, it is time to take another recess here. I think we better take one. We are going to run, as I said, until about 12:30, so the jury will be excused for another ten minute recess.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I might say for the benefit of both counsel here that this matter of where to draw the line in [299] allowing an expert to bring in evidence of what he considers comparable sales is a difficult matter. In the past, if it comes within the time and distance limits that the Court has fixed or has indicated to counsel have been fixed, I have been inclined to leave it to the jury to determine the comparability or the degree of comparability, if any they find.

The witness is an expert, the Court is not, and if the witness says, "I, as an expert, consider this comparable sufficiently to influence my judgment as to value," it is difficult for the Court to put his non-expert judgment up against the expert's expert judgment and say, "No, it isn't and I am not going to let it in." I suppose there would come a time if we tried to bring in extreme examples where the Court would have to say, "No, that isn't, as a matter of law, in any wise comparable and cannot be admitted."

Now on the basis of that, Mr. Swanson, I will

(Testimony of C. Marc Miller.)

hear from you. I make these prior observations not that I have definitely made up my mind or irrevocably made up my mind, but simply to try to shorten the matter by indicating what my ideas are on it. Then I will hear you and make my final judgment afterward.

Mr. Swanson: I will again at the proper time object to the use of this sale and reference to it. It is a sale [300] for \$330,000 of 7,300 acres, as I understand the witness. \$117,000, as I understand the witness, is the value of the buildings, is that not right, the insured value?

A. Approximately.

The Court: What does that leave for the land? How much an acre?

A. Well, there is the thousand acres of irrigated land and the range land, and it leaves \$100 an acre for the irrigated land, some of it, \$50 an acre for some, and \$7 per acre for the range land.

The Court: Well, all right.

Mr. Swanson: Now going on, there is a lot of spreads in Ellensburg with that valley land, lots of irrigated land association with them that have been sold and they have some range land incident to them, there is the Cook sale and several of them, but they are not comparable as a matter of law because it is an entirely different type of land. Here are 7,300 acres being compared with 33,000 acres, 1,000 of the 7,300 being highly developed irrigated land and \$117,000 of the \$300,000, or one-third of the

(Testimony of C. Marc Miller.)

whole sales price, being the value of buildings, a special kind and setup of buildings.

As a matter of law, I think, your Honor, there is a limit to which we can go. Now, if this is allowed, then I must bring in irrigated land sales where there is a [301] thousand head capacity, and we can get lots of them up in Ellensburg. They are not comparable but we can get them. They are there and they——

The Court: Well, as I understand it, the contention is not here that this ranch in Ellensburg, which is the subject of the inquiry here now, is comparable as a unit to the Phillips-Haggerty case in suit here, but that there is a sufficient similarity to the range land to compare the range land of that place with the range land here.

Now, we have got a 32,000 acre place, 36,000, I think it is altogether, and you don't find very many of them around, and I think that counsel on both sides is going to have to resort to some extent, I think, to breaking this down into range land and crop land and bringing in what they consider to be comparable range land sales and comparable wheat land sales. I suspect that counsel will go to the Horse Heaven country or some place where there is some pretty good wheat land and bring in comparable sales of wheat land. Now, if you take a wheat ranch over in the Big Bend or down here in the Horse Heaven, that isn't comparable to this Phillips-Haggerty Ranch, by no stretch of the imagination could it be, and yet if your expert says

(Testimony of C. Marc Miller.)

this wheat land compares favorably with the wheat land on Phillips-Haggerty, this wheat land sold for so much, [302] therefore this should be, I think that is a fair basis of comparison.

Mr. Swanson: That's right, but it won't be buried down in the sale of 7,300 acres, a little part of that for range land, buried down in a \$330,000 valuation as a small part assessable to range land. That is exercising a long degree of discretion to try to find what that range land is worth to that property.

The Court: Mr. Hull.

Mr. Hull: It seems to me that counsel's complaint might be better taken if he wasn't obviously depending on a showing that there was a lot of crop land figures in this Phillips-Haggerty tract and, as the Court has said, there is obviously going to be testimony as to the value of crop land as an isolated thing.

Now, it isn't possible, in other words, to find another place just like this one, anyway. We don't have that big a spread anywhere in pure range land.

The Court: And I think also it might be difficult to find range land sold in large quantity by itself. It is usually sold in connection with either some crop land or some irrigated land or something else for the carrying capacity.

Mr. Hull: That's right, that is true, and that is where this thing ties in, your Honor, with the carrying [303] capacity that this witness is talking about. If a man is in the market to sell or to buy, that is one of the things he is going to have to take into

(Testimony of C. Marc Miller.)

consideration and he will weigh the kind of land such as the Savage Ranch against this as part of the determination.

The Court: I think if counsel can find some comparable wheat land or what his expert says is comparable wheat land, it wouldn't make the comparable sale inadmissible because it might have more improvements or some fancy grain bins or barns or farm machinery included in the sale. If you could segregate it out fairly, I think you would be entitled to show it.

I think this is getting close to the line, I should think, but I think it still is within the realm where it is a matter for the jury to determine whether or not it is comparable and to what extent.

Mr. Swanson: For the record, may I make an objection after the jury comes in?

The Court: Yes, I think you should to keep your record.

Court will recess for ten minutes.

(Whereupon, a short recess was taken.)

The Court: Sorry to keep you waiting. I had to go put through a long-distance call to Spokane, delayed me somewhat. [304]

All right, go ahead, Mr. Hull.

(Whereupon, the following proceedings were had in the presence of the jury:)

Q. (By Mr. Hull): Mr. Miller, then what was the over-all selling price on the Savage Ranch property that you were just talking about?

A. \$339,000, including equipment, stock and

(Testimony of C. Marc Miller.)

land. 400 head — no, 600 head of cattle went with that deal.

Q. And the range lands, and what do you compute——

Mr. Swanson: Just a minute. How much range land and how much irrigated land?

Mr. Hull: He has already testified, I believe, that there was 6,300 acres of range land.

A. Yes, sir.

Q. And a thousand acres of irrigated, a total of 7,300 acres.

A. The owner placed the value on the range land in his negotiations at \$7 an acre, and that is exactly the way it figures out.

Q. \$7 per acre? A. Yes, sir.

Q. Do you wish to refer to any other sales that you have had in mind in arriving at your computations in this case?

A. Yes. I was quite familiar with, and have been over [305] several times, the property which was sold by Stamphley to Weitz. We at one time had the property for sale and I showed it several times for sale. I had nothing, however, to do with the sale to Ulrich and Weitz. The property was sold, however, March 6, 1953, and it had 8,720 acres of land, including at that time over 500 acres of land in cultivation. It has a nice headquarters building, set of buildings, including a residence with a family orchard surrounding it, a large barn and machine shop, blacksmith shop, lambing sheds, other buildings at the headquarters. To the rear of the head-

(Testimony of C. Marc Miller.)

quarters is a large reservoir from which they take their water for domestic purposes—I mean for irrigation purposes—and that water is from a developed well up the canyon beyond that. There are other developed water holes, I think four others on the place, if I remember.

The land is very close to this property of Phillips and Haggerty, being from three to 10 miles south through the entire spread.

I think it is a very comparable sale, and that property sold for a figure of exactly \$10 per acre straight through, including the cultivated land, the improvements and all.

This is one of the sales which I wish to cite as [306] supporting the fact that these ranches are sold for a straight figure, straight through, regardless of how much is in cultivation.

Q. Is there any other such comparison you wish to make?

A. I also called on Sam Andrews and went over the ranch in Grant County which was sold to the Sievercropp Brothers of Ephrata. That ranch is a rectangular tract of ground. It is completely enclosed in hog-tight fence and cross fenced. It is about 10 miles long running westerly from about a mile and a half west of Ephrata, and it is the large range just north of the irrigation canal and irrigated lands around Winchester to Ephrata in Grant County.

It is a very accessible piece, a very desirable piece of property, and the equipment, the buildings, the

(Testimony of C. Marc Miller.)

land, was all sold, and Sam Andrews was a very good operator, kept everything in good shape, and the property was in excellent condition when it was sold.

Q. And what was the date of the sale?

A. That sale was October 8, 1953. It contained 8,840 acres and the entire price was \$200,000.

Q. Did that ranch include any crop land?

A. Yes, it included 1,140 acres of crop land at that time. Since then there has been considerable more land put in dry land farm. [307]

Q. And was the balance then of 8,840 acres, or roughly 7,700 acres, in range land?

A. Yes, sir. The seller expressed that there was considerable more crop land which he had not broken out in this sale. He made a special point of that.

Q. Can you give us——

A. In talking with him as to the sales price, his figure was that the range land sold for \$10 per acre, and that is the way the sales breaks down.

Q. \$10 per acre? A. Yes, sir.

Mr. Hull: Would you mark these for identification, please?

The Clerk: They will be Exhibits 45, 46 and 47.

Mr. Swanson: This witness didn't take the pictures, but I have no objection if he identifies the subject matter.

The Court: All right.

Q. (By Mr. Hull): Showing you Identifications
42——

The Court: 45, 46, 47.

(Testimony of C. Marc Miller.)

Q. (By Mr. Hull): —45, 46 and 47, do you know who took these pictures?

A. Yes, sir.

Q. By who?

A. Mr. Conner took those pictures. [308]

Q. Were you with him when he took them?

A. That's right.

Q. And do they fairly represent the areas depicted as you saw them on the date taken?

A. Yes. I had to go back to the ranch to talk to one of the men there that I had not had an opportunity to see, and while I was going back there, Mr. Conner went with me to check this information also, and when we started to get into the ranch, I said, "That would be a beautiful picture," and he said, "I think I will take it." So that is the way that picture was taken.

Mr. Swanson: Your Honor, just the answers to the questions are all we need here. We are pressed for time and I think all this extraneous matter——

The Court: Yes.

Mr. Hull: One further identifying question:

Q. Were these pictures taken on the Sievercropp property that you have just referred to?

A. Yes, sir.

Mr. Hull: I will offer Nos. 45, 46 and 47 in evidence.

Mr. Swanson: No objection.

The Court: They will be admitted. [309]

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits Nos. 45, 46 and 47.)

(Testimony of C. Marc Miller.)

Q. (By Mr. Hull): Would you take these then and by number explain to the jury what they depict and show them the pictures?

A. No. 47 is a picture taken from the rear of the ranch headquarters looking eastward across the barnyard and front part of the picture and showing the range land to the rear.

Picture No. 45 is a picture taken at the road near the entrance to the headquarters buildings showing the buildings at the headquarters and the cultivated field in the foreground.

Picture No. 46 was taken along the ridge of the hills looking northerly from approximately the center of the ownership, showing the range land to the left and the cultivated land to the right.

Q. Are those all the specific sales you want to refer to, or do you have any others?

A. I inspected several other properties. I believe those are all of the sales that I need to refer to, excepting I did inspect several of those that Mr. Conner referred to and did consider them.

Q. In all, you have considered quite a number, have you not? [310]

A. Yes. And most of them, I would say, within an area, a distance of 15 or 20 miles of the ranch itself.

Q. I assume that you heard previous testimony describing, among other things, the improvements on the Phillips-Haggerty area? A. Yes, sir.

Q. Do you have anything that you wish to add to that?

(Testimony of C. Marc Miller.)

A. No, I think the buildings were well described by Mr. Conner. I remember them as having seen them before previous to this last year. Of course, when they were occupied, there was grass around there and they looked better than they do now.

Q. Yes.

A. When they were occupied, there was a small area of garden around there, too, so it gave an appearance of much better habitation prior to looking at it now when it is abandoned.

Q. I think you have referred to the fencing that you have observed on the land? A. Yes, sir.

Q. What as to the sources of water and their adequacy?

A. Well, I think the southern part of the range has, of course, more water than the northern part. There are two good springs in the northern or Rothrock area, but [311] it is not as well watered in the northern end.

Q. Have you also made yourself familiar with the area shown on that map now before us in blue, the remainder of the Phillips-Haggerty ownership not taken in fee in this case?

A. Yes, sir, I have.

Q. Can you tell us a little about it?

A. The property is cut by Cold Creek through the center running east and west. The elevation is lower than all of the other ownership with the exception of the lower part of the Rothrock. The elevation runs, I would think, somewhere between 1,500 feet in the center, rising to the north to the

(Testimony of C. Marc Miller.)

high part of the crest probably as high as 3,000 feet in there. It is mostly in a lower rainfall belt region with less precipitation, less forage on the ground, mostly sage brush and cheat grass.

Q. Now, have you considered the element of that acreage you have just spoken of remaining in the Phillips-Haggerty ownership in connection with your valuation of the fee taking in this case?

A. Yes, I have.

Q. And what consideration do you give to it in that respect?

A. Well, with that blue area added to the ownership, it becomes a part of the ranch operation and has a value [312] in connection with that operation. When you take the headquarters away from it and the better land away from it and the water sources away from it, it becomes of a great deal less value, and I think it has been severely damaged by the taking of the other land by the government.

Q. And you have considered that fact?

A. Yes, sir.

Q. In arriving at an opinion in this case?

A. Yes, yes.

Q. Now I will ask you, Mr. Miller, have you, on the basis of your experience and familiarity with the subject land in this case, considering all the other factors to which you have testified, and now having specific reference to our Cause No. 892, the fee case——

A. Yes, sir.

Q. ——arrived at what in your opinion is the

(Testimony of C. Marc Miller.)

fair market value of the 33,000 plus acres taken in condemnation in that case? A. Yes, sir.

Q. As of the date of taking of February 15, 1954, upon the basis of its fair market value that date, tested by what a willing buyer, fully informed, would have bought for and a willing seller, fully informed, would have sold for on the open market for cash? [313] A. Yes, sir.

Q. And including your figure of severance as to the balance? A. Yes, sir.

Q. What is that figure? A. \$335,000.

Q. Now, with reference to these other causes of action which we are also considering——

A. Yes, sir.

Q. ——have you in addition examined the premises for the purpose of arriving at a fair leasehold, annual leasehold, value as to the areas involved in the other three cases, including the element of severance, if any? A. Yes, sir.

The Court: Do I understand that this figure that Mr. Miller has just given includes severance damage in the case of 892?

A. Yes.

The Court: I see, all right.

Q. (By Mr. Hull): Having reference then first to Civil Cause No. 452, Mr. Miller.

A. Is that the one that was taken January 1, 1950?

Q. That is correct.

A. Yes, sir.

(Testimony of C. Marc Miller.)

Q. And it refers to the 4,086.69 acres outlined in blue on this Map No. 4. [314]

A. Yes, sir.

Q. You have arrived at a fair annual rental value then of that area as of the date of taking, including severance?

A. Yes, sir.

Q. And what is that figure? A. \$2,850.

Q. That is for the full acreage for one year, including severance?

A. Yes, sir.

The Court: Sorry, I didn't get that figure, Mr. Miller?

A. \$2,850.

The Court: All right.

Q. (By Mr. Hull): Now in Case No. 488?

A. Yes, sir.

Q. And here we refer to the acreage outlined on the map in brown?

A. Yes, sir.

Q. Including 3,034.84 acres, the leasehold of which was under condemnation for a term beginning for one year July 1, 1950.

A. Yes, sir.

Q. Have you arrived at a similar figure as to its fair lease value for one year, including severance?

A. I have. [315]

Q. And that figure is what? A. \$2,230.

Q. As to the third and last leasehold case, No. 762, which involves 6,868.22 acres——

A. Yes, sir.

Q. ——shown on the map in purple?

A. Yes, sir.

Q. To the northwest, the term of years taken in condemnation beginning October 28, 1952——

(Testimony of C. Marc Miller.)

A. Yes, sir.

Q. Have you arrived at a similar figure for one year's fair rental value, including severance?

A. I have.

Q. And that figure is how much?

A. \$2,500.

Q. Now, as to the severance values referred to in each of the leasehold cases——

A. Yes, sir.

Q. ——if you will explain that a little further what your thinking was?

A. Yes. On the first part taken, which is in blue, you are taking from the ownership some of the highest range in the ownership and you are severing the entire ownership in leaving a tract to the west. I have figured that in the taking of that piece there, you have [316] damaged the entire rest of the ownership. In my judgment, the rental itself on the land is only \$1,225, but the severance is \$1,525. I pay more for the severing of the ranch than I do for the actual taking of that land itself. Then that was taken in 1950.

Now, you find yourself with the position in July of 1950 with the government in possession of this strip under lease and Phillips and Haggerty in possession of all of this (indicating) completely surrounding it, and then you are faced with the problem of placing a rental value on this piece over here which has already been severed from the ownership and on which you have paid a severance damage in this taking. Then on that you no longer

(Testimony of C. Marc Miller.)

have 36,000 acres of ground in the ownership, but you have 36,000 acres of ground less the 4,000 taken here, or a total of 32,000 acres of ground in the remaining ownership on which you figure your severance after you take the amount out which is taken in this case here. It gets quite complicated, but I will try and outline it.

You then have in my figure a rental of \$759 for this, but you have taken the only high range in the southern part of the ownership, and I again have given them a severance of almost twice as much, I have given them a severance damage of \$1,473 in that, because you [317] have taken that and made it continually a more unbalanced operation. Therefore, the remainder is worth, in my judgment, considerably less.

Then on the third you no longer have all of the acreage, you have the government then in possession of this in blue and this in brown, then you have Phillips and Haggerty in possession of the remaining ranch on which you have already paid a severance, on which you have already arrived at a value per acre, and you will then take this in purple from that ownership. The severance and the taking can no longer then be figured on the entire ownership but only on the remaining ownership. And in figuring it on the remaining ownership, you have 29,453 acres of ground on which to figure your rental and severance. This is farther removed from your headquarters, it doesn't serve the same purpose as the contiguous piece to the south, so in my

(Testimony of C. Marc Miller.)

breakdown of rental on here I have paid \$1,370 rental on this piece of property and \$1,130 severance damage taken from the rest of the ranch.

And that makes my totals.

Q. I will ask you, Mr. Miller, have you arrived at the figures that you have given to us as to the valuation of the fee and the leasehold entirely as a matter of your own judgment independently of anyone else? [318] A. Yes, sir.

Q. As a matter of fact, this is the first time I have heard your figure, isn't it?

A. You did not know what I was going to place on this property until I testified here, sir. I haven't had an opportunity to see you on it.

Q. There is one other question that goes back to the very beginning of your qualifications, Mr. Miller. I forgot to ask you if you were a member of the Real Estate Board?

A. Oh, yes, I have been a member of the Real Estate Board for over 20 years, a member of the Seattle Real Estate Board, and because of my operation in the state, I have always been a member of the state board, as well as the National Real Estate Board. [319]

* * * * *

Yakima, Washington, Monday, October 31, 1955,
10:30 o'clock a.m.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and after an off-the-record

discussion, the following proceedings were had in chambers:)

Mr. Swanson: I think that counsel for the government should be entitled to close without opening the situation as to geology, because it is only a matter of proof that is within the discretion of the trial court, which is not contested by the defendants.

I have another matter——

The Court: Then another thing, of course, is that your proof can go in and then it can be decided whether or not you have raised an issue sufficient to require him to answer.

What did you say?

Mr. Swanson: We have a matter, Ron——

Mr. Hull: Sir?

Mr. Swanson: You have a map of the Northern Pacific mineral rights.

The Court: Do you have that citation?

Mr. Hull: I am trying to get it right now. [324]

Mr. Swanson: Sure like to read it, too.

Mr. Hull: That map indicates the reserved mineral rights of the Northern Pacific and I have drawn an order based on oral stipulation of counsel and myself to that effect.

Mr. Swanson: Let's see here, I have got the order:

"The defendant Northern Pacific Railway has reserved all mineral rights in and to the following land, 5,620 acres. The Court hereby approves said stipulation and, in accordance with its previous order of October 24th entered here in——"

I don't know about that,

“——directs that determination of the value of said described mineral rights shall be excluded from trial in this court now being heard and postponed until further order of the Court.”

That we have agreed upon.

Mr. Hull: The order referred to is the one based on the N. P. stipulation. Does your Honor understand it this way, we both have to sign this?

The Court: Yes, I think that is what I understood, that it is being held out and reserved out of the case without any detriment to your clients' interest, of course, [325] if it develops that the N. P. has any mineral rights.

But I was going to say so far as your map is concerned, Mr. Hull, that would become material only in case the Court decides that there is a basis of compensation on the mineral rights.

Mr. Swanson: Well, it becomes material for another reason. What if I start to prove the mineral rights, I have to prove all except these, then it would become material.

Mr. Hull: Yes, but I offer it only in the event that we get into a legal discussion on the mineral values in the area.

(Off-the-record discussion.) [326]

* * * * *

Yakima, Washington, 10 o'clock a.m., Tuesday, November 1, 1955.

(The trial in the instant cause was resumed pursuant to adjournment, all parties being

present as before, and the following proceedings were had in chambers:)

Mr. Swanson: First, I didn't mean to affront your Honor when I brought up that state sale, and I am not bitter or anything, but I feel that it was unfair to both sides. Let's discuss it reasonably. You brought up a sale of land that preceded a state sale so as to make it look like \$6.50 land and it was thereafter immediately sold to the state at a much larger sum. Well, now, that is really taking advantage. Then I can't refer to the sale because it is a state sale after that. That is really ribbing our little agreement a little bit far.

I know you didn't do it intentionally, Ron, but that is the effect on me and I get taken in court.

The Court: Well, I shouldn't think that because ultimately land winds up in a state sale or a condemnation case, that that automatically rules out any prior open and voluntary sale that may have come within the time period here that we have allowed.

Mr. Swanson: It creates a false impression in the jury's mind which I can't dispel because it was immediate. [490] That was part of the deal. It was to be sold to the state immediately and it was.

The Court: Well, if the state sale had an influence on it or could be reasonably be construed to have, I think you would be permitted to show it for that purpose if that situation develops. In other words, if somebody buys property and sells it to the state and immediately does so, I think that that could be shown.

Mr. Swanson: As a matter of fact, the Coffins were dealing with the state and I talked to them overnight, put some calls in. They were dealing with the state at the time the Dillings sold it to the state. That is why the Dillings didn't care so much because even the use of the surface was restricted from them. They didn't have the use of the surface, they didn't have the timber, so because there was immediate sale to the state, now I think it unfair to take me on that.

I didn't mean to affront your Honor. I didn't anticipate that that would be a deal that you would be bringing up.

The Court: It isn't a matter of affronting me. There is nothing personal about this either in my judicial capacity or personally; it is a matter of trying to abide by agreements that we have thoroughly and openly arrived at in pre-trial conferences here, and I don't like to see somebody make an agreement and then step out there in the courtroom and [491] disregard it and take an unfair advantage.

Mr. Swanson: Well, I don't mean to ever do that.

The Court: My feeling about it is purely a judicial feeling, not a personal feeling. I try to avoid that.

Mr. Swanson: This is my explanation and I think it is unfair to my clients to take a predecessor sale that was part of a whole transaction.

Mr. Hull: Well, apparently we are not going to be able to get through this case without our feelings

being disturbed on that subject, anyway, Walt. I expressed myself to you yesterday on another matter.

Mr. Swanson: I didn't get some maps to him on time.

Mr. Hull: I didn't think that was very fair, either.

Mr. Swanson: I didn't know you were going to stop your case so soon. That is why you didn't get them.

Mr. Hull: There is no use rehearsing all that.

The Court: Well, I think that perhaps that is my fault. In these cases, a case of this size, I think what we should do after this is to call a pretrial conference and set it all down formally for pretrial conference and abide by the rules which require a party to bring all of the documents he proposes to use and after that he will be precluded from *from* introducing unless he can show a good reason why they weren't produced at the pretrial conference. That can stop this business of one side making a disclosure and another [492] side not, because a pretrial is certainly very unfair if it is a one-way street. Certainly, both sides should disclose, not just one.

Mr. Swanson: All right, I have got that off my mind. That has been rankling, that thing. I wanted to explain why I brought up that sale and——

The Court: All right——

Mr. Swanson: ——and I still think that I am not breaking my word, any word I gave to either of you.

On this instruction on the oil, if your Honor please, if you are going to stay with that sort of talk, your Honor, after I prove that this is an active leasing area now, and it is now whereas it was not in the Martinez case, this is just he got the first lease in the area, it was almost everything was leased up by the time the government took this condemnation action, I am going to prove it is an active leasing area and the reasons why it is, if I am permitted, and that there is a value incident to mineral rights as a result of its being an active leasing area. Now, that will be my offer of proof and I think I should disclose that to you so we can both think it over in the meantime.

The Court: Have you any court anywhere, district court, state, federal, anywhere, that has recognized that sort of a value as a compensable value?

Mr. Swanson: I have had the boy look all over the [493] country on that stuff and I have too, your Honor, and there aren't any cases on either side that I have been able to find, although I told you that I did find some congressional action on it. When the property was taken away from the owners of Camp Roberts in two camps in Oklahoma in federal court, and it was known to be an active leasing area and proven to be, or offer of proof made, afterwards the congress took away from the Army and the government the lease of the mineral rights and gave them back to the land owners.

Mr. Hull: I don't think that is admissible at all.

Mr. Swanson: That isn't admissible here, I am

just telling you the facts. That is the only thing I have found.

Mr. Hull: I submit on the government's side of the question that there is law to be found contrary to counsel's contention. Certainly, there are several cases that hold unless there is the foundation established that there has been oil producing going on in the vicinity or at least discovery of commercial proportions, then these oil leases are wholly immaterial for proving of any value.

Mr. Swanson: O.K., I want to add one statement more. For eleven years there was commercial production within seven miles of this ranch of gas.

The Court: I know about that.

Mr. Swanson: For eleven years.

The Court: When did that stop? [494]

Mr. Swanson: That stopped in 1929 or '31.

Mr. Hull: The early 30's.

Mr. Swanson: Then on back for 11 years.

The Court: There hasn't been for over 30 years?

Mr. Swanson: For over 25 years.

Mr. Hull: Twenty-five years.

Mr. Swanson: Right.

The Court: Twenty-five years.

Mr. Swanson: But oil and gas is there for millions of years, you know.

The Court: Well, yes, but in commercial quantities and availability.

Well, as far as my following this instruction is concerned it is helpful to have at hand what you have said in some prior case, but, of course, a judge should be like a wild goose, every day is a new day,

and I am not bound to anything that I did even yesterday even as far as today is concerned.

Mr. Swanson: Now, that case I want to read. I haven't had a chance. Could I read it during the noon hour?

The Court: Yes.

Mr. Swanson: The volume I can't get.

The Court: Yes, we won't get to this today, I assume, anyway.

Mr. Swanson: No. [495]

The Court: Very well. [496]

* * * * *

D. EVERETT PHILLIPS

a defendant herein, called and sworn as a witness on his own behalf, was examined and testified as follows:

Direct Examination

By Mr. Swanson:

Q. Your name is Everett Phillips? A. Yes.

Q. Are you one of the three partners in the ownership of this tract that is being taken by the government? A. That's right.

Q. Where is your home?

A. Lind, Washington.

Q. What has been your lifetime occupation?

A. Wheat and cattle farming.

Q. Were you with your father and Mr. Haggerty when they first visited the Rothrock range with the idea of purchasing it?

A. Yes. That was when I first started in the cattle end of the business.

(Testimony of D. Everett Phillips.)

Q. Did you examine the range at that time?

A. I did. [601]

Q. What was the condition of the range at that time?

A. Very favorable, I thought, to my limited knowledge.

Q. What did it look like? Describe it?

A. Looked awful big. It looked like it would be quite a potential of farm ground. There was a lot of big, husky bunch grass. Whenever you find that, it is a good indication that there is suitable soil for wheat farming.

Q. Did you examine the soil as to a comparison between that and Ritzville and Lind?

A. Yes, when you crumbled it, it felt very much like the soil up at our home near Lind.

Q. Did you examine, dig into the soil to look for moisture conditions?

A. Yes, that is one of the things I was raised to do. If soil doesn't have any moisture down a few inches below the surface, it, as a rule, isn't considered very good farming soil. That is the whole thing we base our farming on is the retentive powers of the soil to hold the moisture.

Q. What do you call that soil down underneath the surface of the ground?

A. I would call it subsoil.

Q. I mean, what do you call the moisture? Excuse me.

A. Reserve moisture. [602]

Q. Reserve moisture. Does that reserve moisture

(Testimony of D. Everett Phillips.)

recede or advance during different seasons of the year, and, if so, how?

A. Well, yes, in the fall after the rains have wet it down thoroughly, it is from the surface on down, and later on in the season there is a definite line between the top moisture and the reserve moisture.

Q. In the fall, is there a time when the two meet, or not? Would you describe that for the jury?

A. We hope there is. If there isn't, there has been no new moisture. Down, oh, from the wheat angle, down about six to eight inches, there is moisture. You can scrape the dust off the top and there will be enough to ball up, make a ball. That is the whole theory of dry land wheat farming.

Q. Does dry land wheat farming and the way you practice it at Lind and the way you practice it at the Phillips and Haggerty Ranch here depend upon summer or spring rains?

A. No, no, they do not. In the last, I presume, twenty years, farm methods have changed enough that you are not dependent at all on spring moisture. The fall wheat sends its roots down enough that it will keep coming. The so-called crop failures in the thirties were due largely to spring-type grains. They didn't receive any spring moisture, consequently there was no yield to [603] speak of.

Q. The top of the land in July, we may assume, is dusty. Does that have any thermal power or does it cause the moisture to be retained? Explain what the situation is there.

(Testimony of D. Everett Phillips.)

A. The dusty angle would revert back to the fallow, the summer fallowing. You work the ground, cultivate, make a mulch on top. It acts like an insulating blanket and it holds the moisture from evaporating any further.

Q. When you summer fallow, then, you create a dusty condition on top. The end objects of summer fallowing, though, is to do what with regard to reserve moisture?

A. In below a twelve inch rainfall area or belt, it isn't possible to annual crop. It takes moisture from two definite seasons to support one wheat crop. Hence, the summer fallowing is to keep the weeds and other plants from robbing that moisture.

Q. And is that the way, is that an accepted practice? A. Definitely, it is.

Q. Is that a measure of assurance on the crop that you do get in the odd year? Tell whether it is or not?

A. Well, it is definitely an assurance. Without this summer fallow practice, there would be no crop to harvest unless it was an unusually wet year, one out of ten, say. [604]

Q. Under what annual rate of rainfall is marginal or submarginal land that is not good wheat land, if you know?

A. Six to seven. Below that would be submarginal.

Q. Is six to seven inch rainfall good wheat land?

A. No, no, it isn't. I said six to seven because that is all we have had in our area the last two

(Testimony of D. Everett Phillips.)

years. It isn't our average, but due to some reserve moisture in the soil, we still have had reasonable wheat crops.

The Clerk: Defendants' Exhibit 60 for identification.

Q. (By Mr. Swanson): Were you out on this range in July of 1954, the Rothrock range you were describing? A. That's right.

Q. Did you have occasion to test the reserve moisture at that time?

A. Yes, to settle an argument.

Q. With me. What is that picture?

A. That is a picture on the lower end of the Rothrock, about a quarter of a mile from where that old trail drops down into the old sheep camp at the lower end of Sourdough. We stopped on the lower end there and dug. Surprisingly to some of the parties present, down ten inches was enough moisture to make a ball of moist dirt.

Q. Now, who was present?

A. Mr. Urquhart, Mr. Swanson and myself.

Q. Was I the argumentative one? Does this picture—— [605]

A Juror: Did somebody turn the heat off in here?

Mr. Swanson: Your Honor, I noticed that too.

(Off-the-record discussion.)

The Court: I will recess for five minutes and see if we can't get something done.

(Whereupon a short recess was taken.)

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): Mr. Phillips, you were present when Identification No. 60 was taken?

A. Yes.

Q. And it fairly depicts what is apparent on the picture? A. Yes.

Mr. Swanson: I offer Identification No. 60.

Mr. Hull: No objection, counsel, if you will locate it a little bit.

Q. (By Mr. Swanson): Oh, counsel wants me to locate it. Would you make a mark on any one of these maps, preferably our own down here, where this was taken?

A. It was taken near the road just north of Sourdough Canyon, to the best of my recollection. It would be right in this area (indicating).

Q. Make a little circle there. Was it in the bottom of a canyon or out in the flat or on the side of a hill with reference to such topography? Would you describe it?

A. It would be on a ridge, comparatively flat, gentle sloping ridge. [606]

Q. Now, the ball that is in the man's hand is what? What makes it that way?

A. There is enough reserve moisture in it that it will cling together. In our wheat area, we always figure that if submoisture will cling together when you squeeze it enough that it doesn't fall apart when you toss it in the air, that is sufficient moisture to bring up fall grain.

The Court: For the record, the exhibit will be admitted.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Oh, I'm sorry.

The Court: That's all right.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 60.)

Q. (By Mr. Swanson): Now, in 1949, you looked at that area and made these tests, did you?

A. Yes. A wheat farmer by nature goes stumbling along kicking the soil.

Q. Did you go over the range land at that time, up to the north, over to the west?

A. We rode the general area horseback that day.

Q. And what did you find in the way of water availability for stock?

A. Surprisingly well-watered for that type of range. Being [607] the first time we had ever been on it, we were even pleasantly surprised at the number of springs.

Q. Was there any other type of water besides springs?

A. Intermittent running water in the canyon bottoms.

Q. Now, I want to ask you to describe why you say it was intermittent running?

A. Well, that seems to be one of the characteristics of this country. Why, I don't know, but the water will run along and apparently it will hit a fault in the rocks or something and it will sink out of sight for maybe a few hundred yards, maybe half a mile. Lower down the creek bed, it will rise up

(Testimony of D. Everett Phillips.)

and flow visibly for another area, then maybe fall again.

Q. For how long a period during the year-around cycle does it flow in those places where you see it?

A. Well, most of those that I referred to were year around with the exception of the spring of the year. They would probably run during the run-off season, they would run constantly.

Q. These springs, were they year around or just intermittent?

A. No, most of them are year around springs.

Q. And with reference to each section of land, were there springs or not with reference to each section of land? What was their spread, in other words? [608]

A. Oh, it can't be pinpointed down a spring every section, of course, but the range was well watered. The cattle, I would say a maximum of a mile and a half was the furthestest they ever had to go to water. There was enough water that we got by without the spring development that could be done.

Q. Then when did you first see the Coffin ranch to the south? Was it on that occasion?

A. On that occasion, we saw very little. We just trucked our horses up to the Coffin buildings and rode over the hill. This was in the spring of '48 I refer to. Then in the spring of '49, we came to look at the Coffin ranch.

(Testimony of D. Everett Phillips.)

Q. When did you first discover the wheat potential of the Coffin ranch?

A. Well, there was visible wheat growing when we saw the Coffin ranch. The potential, of course, goes right along with the visible.

Q. You discovered it at that time?

A. That's right, in the spring of '49.

Q. Was it you or your father that discovered it?

A. I follow my father's lead.

Q. The Bailey ranch, when did you first see that?

A. At the same time, in the spring of '49. The Coffin lands almost surround the Bailey. Coming up the road, you go [609] right by the Bailey place. At that time, Bailey still lived there.

Q. You purchased this range, did you, from the three owners then?

A. That's right.

Q. Is it true, as counsel brought out, that you bought it at range land prices?

A. Yes, that is one reason why the sales were all quite close together. We realized it as potential farm ground and naturally we made the deals as soon as we could.

Q. Was the Coffin and the Bailey ranches as well watered as the Rothrock ranch?

A. I would say so, yes. Cold Creek——

Q. Go ahead.

A. Cold Creek waters the big end of the Coffin Ranch.

Q. Are there dams possible in Cold Creek to make permanent storage?

(Testimony of D. Everett Phillips.)

A. Yes, very possible. There would probably be 200 acres that could be irrigated, rill or flood irrigated, from a series of dams in Cold Creek. That would be no problem at all.

Q. You were or were not interested in irrigating any land?

A. It was discussed along with our ideas of developing the ranch before we started hearing rumors of the Army coming in. [610]

Q. When you buy a spread of this size, does it or does it not take an appreciable time to acquaint yourself with it?

A. Oh, very definitely. It is hard to put a time on something like that. Sometimes you think, well, I will just spend a week getting acquainted, but that doesn't happen. You just become acquainted with it through your work. Seems like a fellow doesn't have time to just drop everything and get acquainted with a place. It comes gradually.

Q. Over what period of years would you estimate the proper development of this ranch?

A. Oh, it would probably take four to five years to properly develop it.

Q. Did you ever have a chance to develop it like that?

A. No, no, we hadn't been there too long before we started hearing rumors that they were going to reactivate that firing.

Q. After you had been there how long did they actually take their first bite out of your range?

(Testimony of D. Everett Phillips.)

A. We had occupied it less than a year when they took the first bite.

Q. You bought the first property in what year?

A. I believe that was January, 1950. [611]

Q. Now, wait a minute, the Rothrock range, when did you first buy it?

A. Oh, pardon me, I thought you said when did they put you off.

Q. No, no, I'm sorry. This room is hard to hear in. When did you first buy any of this property?

A. June of 1948.

Q. Of '48. When did you first put cattle on it?

A. In the later spring, a year later, in the later spring of '49, we started moving cattle down.

Q. Did you move cattle down from what location? A. From the Lind ranch.

Q. How many cattle did you put on in 1949 then?

A. Oh, not too many. Somewhere around 500 head of cows.

Q. And did you add to that in 1950?

A. Yes, that's right. We added about that many more the next year.

Q. Now, I understand that you moved off your cattle in fifty what, '52?

A. In the fall of '52, yes.

Q. Now, did you have the beginnings of a working herd, and, if you did, would you describe how you worked your herd on this ranch from the beginning, the first allotment of cattle, until you moved off your cattle in '52?

(Testimony of D. Everett Phillips.)

A. Yes, we thought we had a very nice working unit. As it [612] was described earlier, we wintered down on the lower end of Cold Creek where the feed yards are. It was about the center of our winter pasture and we had hay. We would chop the hay, fill that rack with chopped hay. The cattle were out browsing and grazing when the snow wasn't too deep. They would come in to feed as the storms would drive them in. Sometimes we wouldn't feed for two weeks at a time. Then in the spring, we would move them over the hill over the Filey road down to the river side, keep them spread out. We kept a rider with them all the time for range control. We didn't have fences enough so we had to do our control with horse, man on horseback, moving the cattle around, spreading them out. Then they would gradually, as the summer came on, they would gradually go to the higher ground, and then it was in reverse. The rider, instead of shoving them back toward the river, would keep pushing them away from the river and they would be up on the higher ground until, oh, right after harvest time. Then they would be pushed back up over the hill. Right near the switchback road was where we would come up. We would come up Sourdough Canyon with them. Then they would be in the west pasture, we called it the Born Springs pasture. That was our tentative idea, anyway, until this leasehold business started in. Then along in [613] October, we would run them in, the latter part of September or October, we would run them in on the stubblefield. It

(Testimony of D. Everett Phillips.)

had generally softened up by then, the cattle would eat the stubble, what stubble there was, what few wheat heads, and, of course, around the outlying wheat fields there was always wonderful grass that by necessity was fenced out with the farm land, and so on down to the east end again to complete the rotation. They would be moved down along in the latter part of November after the calves were weaned.

Q. Now, each year, did you have a crop of fat cattle for sale?

A. Yes, I neglected to mention we would brand over on the Priest Rapids side where we had an extension onto the corrals there at Priest Rapids. We did our branding there and then in the fall after we got back over the hill to the main ranch, this crop of calves would be weaned and we would truck them to Lind to wean them up there. It takes a couple of weeks to wean them good. They have to be separated from their mothers. They would be marketed near Lind, Davenport and Moses Lake, or part of the time fed out over that winter, marketed the next spring.

Q. And did you have an annual sale of cattle then from this range, of beef from this range? [614]

A. That's right, there was the calf crop and a few yearlings, generally, the tag end of the calf crop to sell every year.

Q. Have you records of the amount of such sales?

A. Yes, we have records. Partially, with me.

(Testimony of D. Everett Phillips.)

Q. Now, don't state it, but could you state the value, the total value of the sale for each year?

A. I believe so.

Q. Now, don't answer this, because counsel wants to object: Will you state the total value or the total price received by you for the sale of cattle at the end of each season from this range?

Mr. Hull: Thank you, counsel. I do object on the ground that the question is not material to the issues in this case.

The Court: The objection will be sustained.

Q. (By Mr. Swanson): In 1952 in the spring, it has been brought out that some cattle were moved off this range. Where did you move them to?

A. By necessity of this fee taking, we had located a ranch in Oregon and we moved them to that ranch. We looked for quite a while trying to locate closer to home, but larger cattle ranches just aren't available, we found out.

Q. So the closest place you could find was Oregon, is that [615] right? A. That's right.

Q. How many head of cattle did you move to Oregon in the spring of 1952?

A. Around 300 head, as near as I can recall.

Q. And the balance of the movement to Oregon was when?

A. In the fall after harvest along in October sometime, we took everything down then, cleaned out the ranch completely.

Q. About how many head were taken down there?

(Testimony of D. Everett Phillips.)

A. Around 800 grown stuff, I believe, yearlings, bulls.

Q. In addition to the calves?

A. And the calf crop, that's right.

Q. Did you sell off a number of animals that year that weren't taken down to Oregon?

A. Yes, for interstate shipment, all the cattle had to be tested and get a health certificate, and we sold some because of that, and we had a few steers that had been carried over from the year before and they were also sold.

Q. And that interstate shipment, what was your record of poundage for transportation of beef? Approximately is all right.

A. Something over one million three or four hundred thousand pounds, I believe. [616]

Q. Now, those cattle were on your ranch, how many men did it take to operate that herd of cattle?

A. Well, that was one of the beauties of this type of a ranch, it is low overhead, low maintenance. Even in hard times, a fellow could still hold his head above water maintenance-wise. Most of the time, one man handled the cattle, another man the farm work, except when there was a big movement on, like moving them over the hill. It is quite a chore for one man to try to move a bunch of cows and calves especially up a steep hill. The calves keep wanting to go back. At that time, there was more help, fellows from the wheat ranch would be brought down to help. Most of the time, two men ran it.

(Testimony of D. Everett Phillips.)

Q. Is that operation, as operations of this size go, is that a reasonable operation, economically speaking? A. I would say very reasonable.

Q. To make it that economical, was it necessary to have fencing? A. Oh, yes.

Q. Would you describe that?

A. It would be impossible to get along without fencing. Especially on the Rothrock side, it seems as though the cattle and horses like that area, even the buffalo like it, and it was hard to keep strays out. One time we [617] rounded up, I think we had seven or eight riders that day, rounding up horses, rounded up over 300 head of wild horses. Driving through the road, you would say, well, maybe there is only 50 head. There would be a few in this canyon, a few in that pocket. And a while later, about a month or two later that same fall, we had another similar horse roundup, run out another 130 or 40 head. There were over 400 head of wild horses on that range when we moved in there, and then we fixed up what fences there were, built new fences, kept them in repair, and it was much easier to maintain the stray angle after that.

Q. How many miles of fences did you have on that ranch after you added to them and completed it?

A. Oh, altogether, with some of the holding pastures and horse and bull pastures, I believe there was 84 or 5 miles.

Q. Did that fence line, may I suggest, did it sur-

(Testimony of D. Everett Phillips.)

round the ranch? If it did, say so and then I will have you point to where it was.

A. Yes, it went around the outside, it was fenced in.

Q. Did you have cross fences?

A. Yes, yes. The original Rothrock purchase was all fenced from the Coffin and the Bailey.

Q. Now, the perimeter fencing had what to do with the [618] number of men that you had to hire?

A. Well, the first thing in the spring, of course, there was always the job of checking fencing. It might take an extra man on that for a week or two, and then after that one man. All he had to do then was keep the cattle spread out, keep from too many around one spring or too many around a place where the grass was being eaten down. He didn't have to worry about them getting out or other cattle coming in.

Q. In 1950, what was the effect of the government taking for leasehold approximately 7,000 acres of your range?

A. Very noticeably. That was some of our better range and it couldn't help but affect the operation of the ranch.

Q. What upsetting effect was there to your planned economy there of that ranch, if any?

A. Well, by necessity, we had less range for cattle. We could carry fewer numbers, and even though the first taking left a gap over on the west side, we didn't have access to it, so both takings might well

(Testimony of D. Everett Phillips.)

have been at the same date as far as use to us was concerned.

Q. Was there a guard station where there was a warning sign out or some type—

A. Not in the sense that you would imagine a guard station. There was a telephone line up there and a couple of boys in a jeep or some other vehicle stationed there at all [619] times during the day.

Q. Was there ever any direction to you to stay off of this land?

A. Oh, yes, yes. We at one time thought we would borrow some from the Army, sent a man over to fix the fence, and they ran him out.

Q. When the next taking of higher ground of 6,068 acres was taken, did that disturb your operation at all?

A. You mean the Rothrock taking?

Q. Yes?

A. It would have very definitely, but it was taken after we moved our cattle out.

Q. And you moved your cattle out at whose direction?

A. Some supposed man for the Army Engineers' office out of Walla Walla. I don't recall the man's name.

Q. Now, the amount of cattle that you did run on this range were run on what part, the lower or the upper, or both?

A. The lower part in relation to the Coffin and the whole Rothrock area.

Q. Did you have it fully stocked?

(Testimony of D. Everett Phillips.)

A. No, no, we didn't. We started out with a few head, put a few more on the next year and, like I mentioned earlier, we started hearing rumors that the Army was going to reactivate so we didn't stock any heavier after [620] that. We knew we were going to have to move so we were just marking time, you might say.

Q. Was there a fence at the bottom of the Rothrock or at the bottom of the other taking other than that guard station?

A. On the Rothrock?

Q. Yes? A. On the Rothrock side?

Q. Yes? A. There was no fence, no.

Q. Was there on the other?

A. There was an existing fence between the wheat fields and what we called the west pasture. The Army used it. Apparently their line came on down through the middle of the field, but they didn't use it, didn't even force it, they just used the fence.

Q. Now, your wheat growing area was what? Was it the former wheat growing area that the Coffins developed or was it one of your own?

A. Well, that was our base, yes. We started out, when we moved on there in the spring of '49, started out with that and added to it. In the spring of '50, we plowed up quite a bit more and in '51 we plowed more.

Q. Would you point out on the map just which fingers you did use for wheat on the brown area?

A. In Section 10 on the so-called Coffin ranch, there was quite a large field, just across in 15 there

(Testimony of D. Everett Phillips.)

was one small field, two or three other fields down at a little bit lower elevation. Just south of the Coffin buildings, there was quite a field there. It tied in with the field down below the fish pond. There was a little oat field that we used to raise horse oats on just below where the old barn was, and then that was all there was right in there. There wasn't any in Section 13 plowed up.

Down at the Bailey place, there were fields on both sides of the creek in Section 18.

Q. Point out the perimeter of the field to the north there.

Mr. Hull: May I suggest, counsel, it is proper that he illustrate his testimony by marking those on the map as he describes them. It would save us a little time.

Mr. Swanson: It is going to take a long time to map out these wheat fields. I would suggest counsel would examine him that way. That won't take me but a minute.

The Court: All right.

Q. (By Mr. Swanson): Point out the perimeter of the largest wheat field there on the Bailey.

A. There was a quite sizable field straight south of the Bailey, and then on east in Section 20 and some in the [622] corner of 17.

Q. Were all of those wheat fields within the brown areas on this map? A. That's right.

Q. Now, what years did you crop that land?

A. We started cropping in '49 on the Coffin, what the existing Coffin was. We bought it for 700

(Testimony of D. Everett Phillips.)

acres of broken out land. Actually, it wasn't that much, probably four to four fifty. We broke out about as much more as what was there, thinking we had 1300, 1350 acres, but when the breakdown came the ASC office here in Yakima informed us we only had 1,087. So I guess that was it. We did most of the plowing on the Bailey in 1950. Our first crop was in '51. We just used it for hay mostly. Then in '52 we recropped the Bailey and all the Coffin stuff was in. We did that to even it up mainly so that it would all be crop one year and summer fallow the following. Then in '53, it was all summer fallow, '54 all wheat.

Q. Now, you say you cropped the Bailey range two years in a row, is that right?

A. That's right.

Q. Both years were for hay? A. Yes.

Q. Is that the hay you used for supplemental feeding in [623] the wintertime?

A. That's right. We trucked down loose hay, trucked it down to the feed yard and chopped it into the feed rack for winter feeding.

Q. Now, supplemental feeding means what?

A. It means feeding in addition to what grass and brush that the cattle can get. It is mainly necessary in the periods of heavy snowfall. We would during those times, even though the cattle would graze out, our man would feed in the morning about the same time each morning that he fed, and in the afternoon you could drive down there and it would

(Testimony of D. Everett Phillips.)

be vacated, there wouldn't be a critter around the feed yard, they would all be out grazing.

Q. Then, the supplemental feeding is not an entire ration?

A. No, no, definitely not. An entire ration would take an enormous amount of hay. Those old cows, they take a lot of hay in the wintertime.

Q. Now, is that one of the reasons why winter range is valuable?

A. Definitely. Winter range is valuable to offset the feeding. They range out, some years they require very little feeding. For example, Stewart on the north of us went ten years without feeding a bale of hay. The cattle ran up in the pockets where they were out of the [624] wind, ate the taller grass.

Q. Now, you cropped that land in '51 and '52, but not in '53, as to livestock, is that your testimony? A. Repeat the question.

Q. In '53, you did not have livestock on the ranch?

A. No, we moved out with the livestock in '52.

Q. You still had control of the ranch in '53, and did you make a lease of a part of it and what were the terms of the lease?

A. We made an emergency, so-called, lease to a man named Wiley with the stipulation that it could be revoked without any advance notice at any time.

Q. For how much money and for how long?

A. Three month period for \$7,000.00.

(Testimony of D. Everett Phillips.)

Q. Did he represent that he was desperate for range, is that the point, what you mean?

A. Yes, yes, he did.

Q. Did you let anybody else in your range while you had control of it?

A. No, no, we didn't. Apparently before we moved into that area, it had been wide open. Several times we had to put the run on bands of sheep that would come wandering in there, and full of excuses, they didn't realize, or they had an agreement with Coffin. That was one thing we had to be on the lookout for constantly. [625]

Q. Since 1954 in February what has happened to the grazing, particularly of the winter areas?

A. It has been thrown open to all comers. Anyone that has stock in the area runs them in there, it seems like.

Q. And what has it done to your range for the last two years?

A. Oh, it has taken a visible toll of it, naturally. Down next to the lower elevation next to the river, it definitely has definitely taken the crop off.

Q. Is there some new feed growing or not at this time of the year down there, green?

A. Not right at the river there isn't much green growing. The lower elevation hasn't had enough rain yet. The higher elevations and up on the ridges new grass is coming very well.

Q. How do you know that there were several different owners of cattle in there?

A. Tell by the breed of cattle, for one thing.

(Testimony of D. Everett Phillips.)

Q. The brand of cattle? A. The breed.

Q. The breed?

A. There are some well-bred cattle and then in other portions of the range there are some definitely cull types of cattle, and some of the brands are visible as you drive by the road. [626]

Q. Can you tell by branding that they are owned by different owners?

A. That's right, if you can read their brand.

Q. Were there sheep in there in the last two years since you have had possession taken away from you?

A. Yes, on the river side, there were two bands.

Q. Now, along the river there are a row of sections on the breaks of the bank that go down to the river. Do you own those sections?

A. No, we had those under lease. There isn't too much feed there, but it is definitely a valuable feed in that it comes early in the spring, the snow doesn't lay there, but that lower elevation, we didn't own any land there.

Q. You found it wise not to own it?

A. That's right.

Q. Or not economic or what is the reason?

A. There wasn't enough feed on it to warrant owning it. The feed was for such a short period.

Q. Why did you own one section that went right down to the river?

A. That was available mainly, the other wasn't.

Q. Did it give you access to the river or the railroad? A. To both.

(Testimony of D. Everett Phillips.)

Mr. Hull: I object to that type of questioning as [627] being entirely leading and giving the answer to the witness and calling for a yes or no.

Mr. Swanson: Did it or didn't it give him access? He can answer.

The Court: Your question suggests what the answer should be in a good many of these questions.

Mr. Swanson: I can't avoid that entirely.

The Court: Did or didn't doesn't take the curse off of it if you indicate what you want him to answer. I think you have been leading in some of these questions.

Proceed.

Q. (By Mr. Swanson): Where do you get to the railroad? Go through what section?

A. I would have to walk over to the map to recall the section number. We could get to it mainly where the section that the road comes out on.

Q. The wheat crop that you grew and you harvested, you sowed in what year? The last one?

A. It was seeded in the early fall of '53. There had been some late spring rains and there was very good moisture down under, oh, say three inches of dust. We got almost a perfect stand by seeding, like I mentioned earlier, seeding down to the reserve moisture.

Q. How deep do your drills put the little grain of wheat?

A. It varies, anywhere from a half inch to eight inches. [628] Wheat can be covered, that is, from the top of the ground, wheat can have seven inches

(Testimony of D. Everett Phillips.)

of dirt on the kernel itself, come to a very good stand.

Q. Is that how you control the placing of the wheat where there is a moisture level?

A. That's right. We aren't dependent on rains. Rains are very seasonal. When it is time to seed, with the modern machinery, the present type of operation, you seed when you want to, not when the weather demands.

Q. Would you say that this range had ever been adapted or used in connection with modern mechanized wheat machinery? A. Definitely not.

Q. It has been suggested by counsel that the Rothrock basin wheat area is remote and inaccessible and, therefore, not valuable as wheat land. Would you address some remarks to that?

A. Well, I don't agree, naturally. It is a little removed from the main ranch as it sits now. It wouldn't be too much of a job to build a high gear road, you might say, around to it following the contour of the hills around. There could be a very adequate road to move the machinery over to it. And then, too, it is over on the other side in the middle of a large area of range that would supplement that range very well for winter [629] feeding, and on this early feeding angle, there could be worlds of pasture and, also the green wheat, to supplement the dry grass. We have made a practice of that for years. Turning the cattle in on the green wheat in the fall, they don't seem to hurt the wheat a bit, as long as it is pastured in the fall. And then, of

(Testimony of D. Everett Phillips.)

course, the stubble and the chaff left over from harvest makes excellent hay supplement.

Q. Now, is it a good practice to permit horses, for instance, to graze on the growing wheat crop in April of the year?

A. Oh, no, definitely not. In the spring it is a definite disadvantage, harmful to the wheat, to pasture it in the spring.

Q. Now, did you notice after you had lost control of this area that there were horses in any considerable quantity on your wheat areas?

A. Yes, there was quite a number of horses and cattle on the grain in the spring of '54.

The Clerk: 61.

Q. (By Mr. Swanson): I show you No. 61. Do you recognize that picture?

A. I recognize what it could be. It could be one of the wheat fields that the Cold Creek——

Q. Do you recognize the wheat field and the horse area?

A. At the time I was on it, there were more horses than that. [630] It doesn't look like the photographer got them all in.

Q. Is that what happened in your area?

A. Yes, yes, they trampled the fields bad and they were muddy.

Q. You were not present when this picture was taken, were you? A. No, no, I wasn't.

Mr. Swanson: Well, your Honor, this picture is the one we discussed in chambers. I offer No. 61.

Mr. Hull: Did this witness locate this field?

(Testimony of D. Everett Phillips.)

Mr. Swanson: You may inquire of him, counsel.

Mr. Hull: Do you know where this picture was taken, Mr. Phillips?

A. I said it could have been, I didn't say that it was. I have no knowledge as to where that was taken.

Mr. Swanson: Maybe we better withdraw the picture.

Mr. Hull: Then, I think it is not admissible.

The Court: Very well, all right.

Q. (By Mr. Swanson): Were you able to cultivate your wheat land in the winter of '53-'54?

A. No. We tried to, we put in for a permit to get in from the Army. It should have been harrowed twice and fertilized. There was a wonderful stand in despite all of the tramping and the spring grazing by the stock, but we weren't able to. Finally, the day the deadline ended, [631] they gave us a permit or indicated we could have had a permit, I should say, for two days to get in, harrow all that land twice, fertilize it, and move our machinery out. Needless to say, it wasn't cultivated.

Q. Was that impossible to do in two days?

A. Oh, definitely.

Q. What is the advantage of harrowing in the winter to the stand of wheat that you might have or disadvantage?

A. The ground cracks quite badly over the winter. It was even more so that year when the ground was soft, so many head of cattle in there, the ground kind of run together, you might say, and it

(Testimony of D. Everett Phillips.)

was very hard and cracked due to that. And when the ground cracks, if it isn't worked and sealed up, moisture dries out very fast. It would have made quite a difference in the crop. It is an accepted practice in farming to cultivate or harrow the wheat crop in the spring.

Q. That is, in the stand of growing wheat, is that right?

A. That's right, get right in there and tear it right up. The plants are husky enough that it won't hurt them any.

Q. Would the stand of wheat, the bushels of wheat to yield have been greater had you been able to do that?

A. I would say definitely without exception it would have been, when the ground is cracked there is a hard crust. [632] It is speculative as to how much more. Two to five bushel, perhaps.

Q. Was there any other handicap to the yield of bushels of wheat in this particular crop that you encountered that year?

A. None other than the stock being in there off and on all spring and the Army holding their maneuvers, digging foxholes and gun placements and what not in the wheatfields.

Q. Have you got pictures?

A. There is a picture of some tank tracks through one field near the headquarters.

The Clerk: Defendants' Exhibit 62 for Identification.

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): I show you Identification No. 62 and ask if you recognize what that is?

A. Yes, that is a picture of a wheat field taken right over the top of the metal granary, showing tank tracks on the south Coffin Place field.

Q. Did you take that or were you present when the picture was taken? A. Yes, I took it.

Mr. Swanson: I offer No. 62.

Mr. Hull: No objection.

The Court: It will be admitted. [633]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 62.)

Q. (By Mr. Swanson): That shows, you stated, the wheat fields. I notice there is a difference in color in the wheat fields. Would you explain what that is?

A. Yes. This was taken, I believe, the first or second day of July and the wheat was ripening, the more open exposed slopes were getting riper. The draws and the north slopes, the ravines, naturally a little more moisture, a little more shaded, are a little greener. It shows the difference in the spottedness. Of course, in the foreground is the sagebrush and bunch grass.

Q. And the parallel lines through the wheat fields are what?

A. They are the tank tracks I spoke of.

Q. You harvested about what time in 1954?

A. About the middle of July.

Q. How many acres did you harvest for wheat?

A. Around 800, more or less.

(Testimony of D. Everett Phillips.)

Q. How many acres did you harvest for wheat hay?

A. A little over 280, I believe, was the figure we cut for hay.

Q. Did you harvest the hay prior or subsequent to the time [634] you harvested the grain?

A. No, no, the hay was cut earlier. The hay, I believe, was—we started cutting hay, I believe, the last few days in June. There is more food value in hay when the stalk is still green than there is when it turns plumb brown. If you wait until it is almost ripe before you cut it, there is enough sap left in the stem that it will go ahead and ripen and the straw is more like the word “straw,” whereas if it is cut a little greener, there is more food value in the stem and the leaves and, of course, the head will have a small shriveled kernel in it when it is cut in the dough stage.

Q. I show you Identification No. 63. Can you state what that is?

A. Yes, that is the hay baler pulled by a wheel tractor, a man riding a sled behind it to stack the bales six to eight in a pile.

Q. In the background what is shown?

A. In the background is shown two canyons with springs in them on the upper end of the Coffin Ranch.

Q. What are those bunches in the field that are shown?

A. Those are the piles of hay that I spoke of, six to eight bales to a pile.

(Testimony of D. Everett Phillips.)

Q. And where on the map approximately is this grain hay [635] situated?

A. This would be in the west half of Section 10.

Mr. Swanson: I offer No. 63.

Mr. Hull: I assume this witness took these pictures?

Mr. Swanson: Did you take this picture or were you present when it was taken?

A. Yes, I took the picture.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 63.)

The Clerk: I have also marked 64, 65, and 66.

Q. (By Mr. Swanson): This is 64. Do you recognize what that is?

A. Yes. That is the same field looking at it from the opposite end, showing some of the trucks being loaded with hay.

Q. In the background is yet another field, or is that the same one?

A. It is a continuation of the same field. Each one of those dots in the background represents six bales of hay.

Mr. Swanson: I offer No. 64.

Mr. Hull: He took all these? [636]

Mr. Swanson: Yes.

Mr. Hull: I have no objection.

Q. (By Mr. Swanson): In the foreground in the stubble, does that represent the wheat plants?

A. That is the stubble residue, yes. This was dif-

(Testimony of D. Everett Phillips.)

ferent from our normal operation in so much that this was cut a little taller than it usually was. We were pressed for time. Normally, we would have cut this a little closer to the ground for hay purposes than we did in this.

Q. Could you have obtained more or less hay if you had cut it closer to the ground?

A. Oh, considerably more if it was cut closer to the ground. It takes a little longer to cut it though.

Q. Do you know how many bushels to the acre you did get? A. Roughly two tons to the acre.

Q. Each one of those dots in the background represents, you said, six bales?

A. Six bales, yes, that's right, where they were pulled off.

The Clerk: Has 64 been admitted?

Mr. Swanson: I offer No. 64.

The Court: You have looked at this, have you, Mr. Hull?

Mr. Swanson: Yes, he has looked at that one.

Mr. Hull: I have seen it. I have no objection.

The Court: It will be admitted then.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 64.)

Q. (By Mr. Swanson): I show you No. 65.

A. This is roughly the same picture as the other with this exception, it was taken closer to the hay. You can get a little better view of the piles, how they were slid off of the sled behind the baler.

Q. While counsel is looking at that, I show you No. 66.

(Testimony of D. Everett Phillips.)

A. This shows a picture loading hay, transporting it from one of the smaller trucks to a larger truck for transportation up to the Lind Ranch.

Q. Those trucks are owned by who?

A. They are our trucks, our ranch trucks.

Mr. Swanson: Any objection to No. 65?

Mr. Hull: No objection.

Mr. Swanson: I offer No. 65.

The Court: It will be admitted.

(Whereupon, said photograph was admitted in evidence as Defendants' Exhibit No. 65.)

Mr. Swanson: No. 66.

Mr. Hull: No objection to No. 66. [638]

The Court: It will be admitted.

(Whereupon, said photograph was admitted in evidence as Defendants' Exhibit No. 66.)

Mr. Swanson: How long are we going to run tonight?

The Court: Going to suspend as soon as the jurors get through looking at the pictures here.

Mr. Swanson: Very well, I will stop, then.

The Court: All right.

Mr. Swanson: If your Honor please, I should like a conference with your Honor and counsel for a minute afterward. I have two witnesses that have a long way to come and I am in doubt as to whether I should have them in view of our conversation.

The Court: Oh, yes. Well, I will excuse the jury then before we adjourn. The back row are not through with the pictures yet.

(Testimony of D. Everett Phillips.)

All right, I will excuse the jury then until 10 o'clock tomorrow morning.

(Whereupon the following proceedings were had out of the presence of the jury:)

Mr. Swanson: Now, your Honor, I have a witness, a geologist, from the Shell Oil Company who will testify as to the presence of the factors necessary for exploration for gas and oil. He has prepared data as to all of the [639] existing leases in this field and showing almost all the land in and about this ranch to have been leased by various major oil companies. Another man from Montana from the Carter Oil Company, which is a standard oil company, will be here if I call him to testify that he himself has bought mineral rights in such situations as the geologist will describe exist at this area on this ranch, and he himself has bought them for his personal account and for the account of leasehold mineral right companies.

Now, I hesitate to have them come all this distance just to be told they cannot open their testimony on the stand.

The Court: Yes, I understand your situation.

Mr. Swanson: There is definitely a value, I believe, to mineral rights, that it can be proven, and should be translated into some form of verdict. Our mineral rights in an active leasing area are being taken from us, definitely from us.

Now, tomorrow there will be developed, and it cannot be kept out because it isn't separated, there will be developed a number of comparable sales, in

(Testimony of D. Everett Phillips.)

each of which there are all or part of the mineral rights reserved because there are in this section approximately 30,000 acres of range land right next to [640] this Army reservation that have been sold in the last two and a half years that haven't been mentioned in this trial, all of which has either a reservation of all or part of the mineral rights.

The Court: Well, the only leases that you have are the type that you had in the Martinez case, isn't it, these revocable leases for exploration for gas and oil that can be cancelled over night at any time?

Mr. Swanson: Right. The leases have no value, your Honor.

The Court: Well, what has value, then? You haven't got beyond the leasing for exploration stage here, have you?

Mr. Swanson: The value is the fact that if major oil companies will spend money for leases. They are spending it upon their knowledge of geology. Their geology is expended in the area. Then mineral companies come in and buy part of the ownership of the owner's underneath those leases. Getting enough of a spread of them, they are certain to hit——

The Court: Have any been sold here now, anything but leases?

Mr. Swanson: I'm not sure whether any of them have been sold in this area or bought excepting as part of the purchase and sale of all these ranches that are being purchased and sold in this area.

(Testimony of D. Everett Phillips.)

Mr. Hull: As far as reservation of minerals is concerned by a seller—— [641]

Mr. Swanson: Mr. Phillips, you can get down, excuse me.

The Court: Yes, Mr. Phillips, there's no point in your sitting there unless you enjoy it.

The Witness: Oh, no.

Mr. Hull: As far as the reservation by the vendor in a sale of range land, we'll say, of a portion of the minerals is concerned, I can see no way that that would be a measure of value, because it comes under the expression of the court in that case of *United States vs. Harrow*, it is a transaction involving one of the persons interested in the primary speculation. He may have kept the minerals because he wanted to sit tight and see what would happen. It doesn't mean anything in that sense. It doesn't mean anything more under these circumstances we have here than if he let them all go thinking they were of no value, which could be the case, too.

I take it from the cases which we can find touching upon the subject that we have here that we must have the premise of an active, valuable region which has been developed somewhere in the near vicinity to make it worthwhile to assign a value here, and that the leases which counsel speaks of would have a market value of themselves after that first point had been shown. And now, we have neither. [642]

I didn't understand counsel's statement there with

reference to what this witness had acquired. Was it in regions similar to this?

Mr. Swanson: Exactly.

Mr. Hull: Other regions where development had gone on?

Mr. Swanson: Other regions where leases had gone on, a market developed for the mineral rights under the geology of the major companies, and some of those regions oil was never developed. However, in this region oil and gas have been developed, gas furnished for 14 years, and I will offer that as testimony.

The Court: I don't believe the oil has been developed. There has been some marsh gas found down here that petered out after a few years, and that was about 25 years ago. We have had that evidence here in one of the prior cases about the gas that was in the area or vicinity of Grandview, wasn't it?

Mr. Swanson: Oh, that, I have no evidence on that. I have evidence the Northwest Gas Company——

Mr. Hull: It was the Rattlesnake Hill development that has been testified to.

The Court: Wasn't that the same area where part of it was piped down to Grandview?

Mr. Hull: Yes, that is the one.

Mr. Swanson: From Prosser, Grandview, Sunnyside and [643] Toppenish were connected and furnished with gas.

The Court: Well, I suggest that if you wish to

get the court's ruling before you go to the expense of bringing your witnesses here, that you make an offer of proof in the absence of the jury. You may do that just before court convenes in the morning, if you wish, and get your formal statement, because I can't rule until you do formulate your statement of your offer. Your offer might be such that I would say yes, that is sufficient, but you take the responsibility then of having your witnesses bear out what you claim they will testify when they get here.

Mr. Swanson: I will take that responsibility. I will make an offer orally. Did you intend that I make it in writing?

The Court: No, no, you can make it any way you wish.

Mr. Swanson: I haven't had time to prepare it at this time.

The Court: What I had in mind, though, I thought you would wish some time to prepare it and get it definitely stated.

Mr. Swanson: In the morning, say at a quarter to 10?

The Court: Yes, about a quarter to 10, if you wish to come in, you can make it.

Mr. Swanson: I will make an offer then at a quarter [644] to ten in the morning.

The Court: That wouldn't be too late for you to get them?

Mr. Swanson: No, I could still get them. Has your Honor something else on?

The Court: I have a matter set for 9:30, argument here. I have a matter set at 9:30, but I don't think that it should take more than a quarter of an hour, so we can go ahead with the plan, anyway.

Mr. Swanson: Very well.

The Court: Court will adjourn then until tomorrow morning at 9:30.

(Whereupon the trial in the instant cause was adjourned until 9:45 a.m., Wednesday, November 2, 1955.) [645]

* * * * *

D. EVERETT PHILLIPS

having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Swanson:

Q. Now, Mr. Phillips, how did you test this land, the depth of the farm land, when you went out with Mr. Nelson?

A. With a regular soil testing tube, had a hammer attachment on the top, get it down through the soil, brings up the soil samples every foot. You go down a foot and raise it out and clean the sample tube out, then go down another foot, and so on.

Q. I want to know if or not you verified whether this land that was classified as Ritzville loam was or was not three foot in depth and how did you do it? [647]

A. As I have just stated, with that soil sampling

(Testimony of D. Everett Phillips.)

tube. It was a six foot long tube, had a slide hammer attachment on the top to drive it down into the soil to take the samples. We sampled several places.

Q. Did you sample for depth of soil alone or for some other reason?

A. Depth of soil, type of soil, amount of moisture in the soil.

The Clerk: This is marked Defendants' Exhibit 67 for identification.

A. Mainly, one of the big things we were interested in was to see how far down the moisture was. Surprisingly, there was a lot of reserve moisture, being the end of a dry season.

Q. Well, what time of the year is the reserve moisture at its lowest level?

A. It would be after the grass or what other crops had been on. After they have finished growing and ripened, after they have taken all the moisture out.

Q. I mean as to season of the year, spring, summer, fall, winter?

A. No, it would be fall of the year.

Q. I show you Identification No. 67. What does that show?

A. That shows the depth of the soil on the Rothrock side of the range. There is no rock or any other substance [648] other than dirt.

Q. Were you present when that picture was taken?

A. Yes.

(Testimony of D. Everett Phillips.)

Q. Is there a character in the picture for comparison?

A. Yes, I stood in the picture for a comparison. That was in a trench the Army had dug for a gun emplacement.

Mr. Swanson: I offer No. 67.

Q. Is the Rothrock range, the wheat basin area of the Rothrock range, one of the better areas or worse areas, comparatively, in your holding?

A. One of the better areas. That picture, incidentally, is of the same cut that the jury stopped at.

Q. Is that picture near where this was taken?

A. It was taken out of that same cut, the bank of that same cut.

Mr. Hull: I think it should be more specifically located, counsel.

Q. (By Mr. Swanson): This monolith was taken from this same cut? A. That's right.

Q. And was the monolith marked on the map?

A. Yes, I believe Mr. Smith marked it. It would be in the lower corner of Section 29. I should correct myself. It would be in the northeast corner of 29. [649]

Q. Will you come up and mark it?

A. Mr. Smith marked it right in here, right in the corner of the section, kind of on a flat ridge with a gentle slope.

Mr. Swanson: I offer No. 67.

Mr. Hull: No objection.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 67.)

The Clerk: Your Honor, I have marked Exhibits 67 through 86.

The Court: 68.

The Clerk: 68 through 86.

The Court: All right.

Mr. Swanson: May I have them.

Q. I show you No. 68. What does that show?

A. That is the remnants of an irrigation pump that was used prior to our time of ownership. It is still laying there, kind of hidden in the bushes. It is on the Bailey place near the creek, **just west** of the Bailey buildings about a quarter of a mile.

Q. Is that typical or not typical growth on that picture?

A. That is typical brush land and grass land along the [650] creek bottoms. It is quite typical along the creeks and the canyon bottoms. It not only provides forage, it provides shade in the summer and an excellent windbreak in the wintertime. If there is a similar day like today and the wind with it, if the cattle need shelter, they can get in that brush and in the ditches and one thing another out of the wind. It is a definite advantage over a flat country.

Q. Now, do cattle eat solely the bunch grass that we saw on the range?

A. Oh, no, not at all. Cattle are just like a human, they need a variety in their diet. They eat

(Testimony of D. Everett Phillips.)

different grasses at different times of the season. They not only like straight grass, they like a certain amount of browse and brush. Especially in the wintertime, they eat the leaves off of that sage. Some areas of the country, the cattle are wintered solely on sage brush with a little cotton cake pellet supplement.

Mr. Swanson: I offer No. 68, having been identified.

Q. I will ask you how many water holes are on the ranch, approximately?

Mr. Hull: No objection to 68.

The Court: It will be admitted. [651]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 68.)

A. Oh, approximately around 70 springs. That number was arrived at by the government appraisers. Mr. Conner marked about that many on one of our maps. In addition, there is intermittent running water in four creeks, four canyons, and there are seven reservoirs or dams on the ranch.

Q. Now, are your springs solely confined to the gullies and the draws, or on this ranch do you find springs at higher elevations?

A. Yes, there are a number of springs at higher elevation, which adds to the usability of the grass at the higher elevation. If there was just water in the creek bottoms, it would be an almost impossible task to keep the cattle up on the higher ground, but where there is water they will go along the

(Testimony of D. Everett Phillips.)

sidehill pretty much on a level plain from their feed to the water and stay on the high ground with very little trouble.

Q. And does that show at this time of the year that it is or is not year around water holes on the tops of the ridges?

A. Oh, yes, you bet. There are even evidences of stock [652] trails where they have traversed along the sidehills to the water holes, springs.

Mr. Swanson: Now I will, with your Honor's permission, take a little liberty. I am going to have the witness look at pictures showing a number of these springs and offer them as a group so as to save time, rather than one.

Q. Will you identify——

The Court: You may do that, with the understanding that Mr. Hull, if he cares to, can question about them on voir dire before they are admitted.

Q. (By Mr. Swanson): Will you go through those, naming the number and identifying each as you go along?

A. This is——

Q. No. 69 is?

A. This is No. 69. It shows our fish pond spring after it was drained by the Army.

Q. No. 70.

Mr. Hull: Where is it located?

A. It is located just east—it would be in Section 14 just east of the Coffin buildings. This shows the Bailey buildings.

Q. (By Mr. Swanson): Being No. 70?

A. No. 70. Some grass and sage brush in the

(Testimony of D. Everett Phillips.)

foreground and grain land in the background. [653]

No. 71 show buffalo wallow, some grass and brush in the background.

Q. Is that water year around water in that wallow?

A. Yes. It was sufficient water that it was never developed. It is an odd situation, it is just like a drinking fountain, it is full all the time year around.

Mr. Hull: Would you locate it, please, counsel, on each?

Mr. Swanson: Yes.

Q. Where is that?

A. That is in Section 28 on the Rothrock side.

Q. On the Rothrock side, 28?

A. This is the remnants of an irrigation flume that the Baileys had used to irrigate their alfalfa.

Q. On what ranch?

A. It is on the Bailey Ranch in Section 18, Exhibit 73.

The Court: Well, let's see, 73. What was 72? 72 was the buffalo wallow, wasn't it?

Mr. Swanson: We have missed 72 here. It is out of order.

Mr. Hull: 72 is here.

The Court: Counsel wanted to keep 72 out. Oh, I see, that confused me. Buffalo wallow was 72, then, is it, instead of 71?

Mr. Swanson: Buffalo wallow is 71. Counsel has [654] 72 he is holding out.

The Court: Oh.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Temporarily.

The Court: I see. Now you are going on 73 here?

Mr. Swanson: 73 is done, we are now going on 74. 72 is the old irrigation flume.

The Court: All right, all right.

A. 72 is a well west of the Coffin buildings. It shows a pump and pipe in the well. It is in Section 17.

Q. (By Mr. Swanson): Since you have left the premises, the guarding fences there, have they been disturbed?

A. Yes, they have been pretty much destroyed.

Q. What shows here as fencing, is it or is it not in the same condition as when the Army took this property?

A. No, it is in different condition now than it was at the time the picture was taken.

A. This is——

Q. No. 75 is?

A. No. 75 is a picture of a spring development in the upper Sourdough Canyon about a quarter of a mile above where the road crosses the canyon.

Q. In Section 26 or 27? A. In Section 26.

Q. 26.

A. Exhibit 76 shows a spring over on the north end of the [655] range in Alkali Canyon in Section 5 up at the top of the picture.

Q. Is that or is it not a year around spring?

A. That is a year around spring, yes.

Q. In Section 5.

(Testimony of D. Everett Phillips.)

A. Exhibit 77 is a picture of Buffalo Springs, showing the developed spring with the trough.

Q. Have you testified where that is on the map?

A. That is right near buffalo wallow. It is in Section 28.

Q. 28.

A. Exhibit 78 shows water in Cold Creek at the lower end of what is now being farmed in Section 20 on the east of the Bailey buildings about a mile.

Q. What does the foreground and the background of No. 78 show?

A. It shows some forage, some grass in the foreground and brush and grass in the background.

No. 79 is a water hole, a spring in Sourdough Canyon near a sheep camp. It is shaded to where about all you can see is the ripple that the horse is making while he is drinking.

Q. Sourdough Canyon is in?

A. In 29. It is about a mile up from the river.

Q. 29. [656]

A. Exhibit 80 shows a spring on the west end of the Coffin holdings.

Q. About where? A. It is right on the line.

Q. Right on the line. How high ground, about what elevation?

A. Oh, I would judge about 2,500 to 2,600 feet.

No. 81, Exhibit 81, is Alkali Canyon, showing the running water. It is in Section 9.

Q. 9.

A. Shows some trees that I mentioned that the

(Testimony of D. Everett Phillips.)

cattle seek for shade in the summer and also for winter protection.

Q. Does it show three horsemen whose horses are drinking?

A. Yes, it shows three horses strung out there.

Q. Who is the character on the second horse?

A. That character is his nibs, Mr. Swanson.

Mr. Swanson: I am going to offer, your Honor, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80 and 81.

Mr. Hull: May I ask just a couple of questions?

Mr. Swanson: Yes, certainly.

The Court: Yes, all right.

Mr. Hull: Did you take all these?

A. I didn't take those. I was present when they were taken. [657]

Mr. Hull: You were present when they were taken. And when were they taken?

A. They were taken the last few days in the first of June and the first few days of July of '54.

Mr. Hull: Of '54?

A. Yes.

Mr. Hull: Thank you. Who did take the photographs?

A. Mr. Urquhart. He will be on later.

Mr. Hull: I have no objection to the numbers.

The Court: They will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendants' Exhibits Nos. 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80 and 81.)

Mr. Swanson: May I suggest that the witnesses

(Testimony of D. Everett Phillips.)

pass them along as soon as they have seen them?
There are so many.

The Court: The jurors, you mean?

Mr. Swanson: I mean the jurors, pass them along.

The Court: Yes, I think they are doing that. If you will just pass each one as you have looked at it, it will save time.

Mr. Swanson: Your Honor, I think, if your Honor please, that we should, in order that the jurors may see these pictures, suspend for five minutes of questioning [658] while they go through them or until they are through.

The Court: Well, all right.

Mr. Swanson: Your Honor, Identification No. 72 is yet another spring is shown, but the character in the picture is shown pouring water from a can and counsel objects to that because of the fact that it may be a demonstration. I am afraid he might be right and I believe we better not offer it, although I will leave it in the record.

Mr. Hull: My position is that any picture that counsel offers which fairly depicts physical attributes of the place, he may put in, but anything that goes beyond that would be contrary to the rules of evidence.

The Court: May I see it, please?

(Exhibit handed to Court.)

Yes. Well, you are withdrawing it?

Mr. Swanson: I will leave it as an exhibit, but not offer it, your Honor.

(Testimony of D. Everett Phillips.)

The Court: Yes, all right.

Q. (By Mr. Swanson): Now, what does No. 82 show?

A. 82 shows a perspective from the hill looking north toward the river. You can see the gap and Saddle Mountain in the background where the river comes through at Beverly and also the road that connects our ranch. We call it the switchback road, the road that the jury [659] rode down. Right in the bottom of the picture it shows some grass and some horses, saddle horses, going down the switchback.

Q. How far in the distance does this ranch extend in that panorama?

A. Oh, about eight to ten miles off in the distance.

Mr. Swanson: Have you seen this? I offer No. 82.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 82.)

A. No. 83 shows the running water in Alkali Canyon, some more brush protection that I mentioned, and some flowers and forage growth in the foreground.

Mr. Swanson: I offer No. 83.

Mr. Hull: I take it these were all taken by the same person at the same time as you have referred to before?

A. Yes.

Mr. Hull: No objection.

(Testimony of D. Everett Phillips.)

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 83.)

A. No. 84 shows some grass west of the Coffin buildings. It shows some of the native bunch grass. One of the [660] nice things about this ranch was we had no poisonous weeds. There are several different types of forages and grass but no poisonous. We had no problem with cattle eating poisonous weeds and vegetation.

Q. (By Mr. Swanson): This shows what type of growth?

A. That shows bunch grass type.

Q. Does this picture show the value of range land that you had on this ranch?

A. Very definitely.

Mr. Hull: I object to that as calling for a conclusion of the witness.

Mr. Swanson: It doesn't call for a conclusion. He can state what value it was.

The Court: Well, he can point out the advantages of it, rather than draw the conclusion.

Mr. Swanson: Yes, I am not saying that it is valuable; I said does it show the value of this range.

Mr. Hull: That is a conclusion.

The Court: I will sustain the objection. He can point out any advantageous features that he wishes to.

A. It shows the grass growing at enough of a

(Testimony of D. Everett Phillips.)

height that there is very good forage. Even if supposing a snow like this morning happened to fall a few inches, the grass is tall enough, the cattle still have feed and there is still plenty left to where they won't kill it out. [661]

Q. (By Mr. Swanson): What size is the acreage of that type of feed in your ranch, if you know.

A. I would say it was roughly half of the ranch or a little more. Half to two-thirds of the ranch.

Q. Does this show the forage prior to the time that the Army took over?

A. That is on the leasehold, that shows what the grass looked like.

Mr. Swanson: 84, your Honor.

The Court: 84, all right.

Mr. Swanson: I offer No. 84.

Mr. Hull: Where was this taken?

A. That was taken west of the Coffin buildings.

Mr. Hull: West of the Coffin buildings. That would be down in here somewhere or north or south of that (indicating)?

A. No, on west.

Mr. Hull: Would you show us?

A. What is the description? 17. It would be in this Section 17.

Mr. Hull: In the area you have referred to as potential crop land? A. That's right.

Mr. Hull: And this was taken in '54? [662]

A. Yes, yes.

Mr. Hull: No objection.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 84.)

Q. (By Mr. Swanson): 84 is on leased range land, is that right?

A. It is on the range that the Army took away under lease, yes.

This Exhibit No. 85 shows the Coffin buildings in the foreground, taken on the hill north looking down, shows the wheat ground and range land in the background.

Q. Now, I notice that the granary is depicted with a roof on it. Is that the condition now?

A. No, the Army has started dismantling it, started to tear it down. Also, the barn is about demolished now.

Q. This picture, then, does it show the present situation at that ranch?

A. No, no, I would say not. It is in considerable state of being wrecked now.

Mr. Swanson: Now 85 I offer.

Mr. Hull: This is part of the Coffin buildings?

Mr. Swanson: Right.

A. Yes, that's right.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 85.)

Q. (By Mr. Swanson): And this last one?

A. No. 86 shows a typical fence. This happens

(Testimony of D. Everett Phillips.)

to be a horse pasture fence. It shows brush and forage and sage brush in the background.

Q. How many wire fence?

A. 4-wire fence.

Q. Is that typical of cross-fencing or perimeter fencing? A. It is typical of both.

Mr. Hull: Where located?

Q. (By Mr. Swanson): Oh, yes, where is this located?

A. This is located where the jury ate lunch. It would be in Section 14 where we call it the hole in the wall.

Q. On the Rothrock range? A. Yes.

Q. Did you have cross-fencing in the Rothrock range, as well as the Coffin range? Is that what your testimony is?

A. No, there was no cross-fencing. That was the horse [664] pasture fence on the Rothrock.

Q. That is what I wanted.

A. We controlled them by horse and rider on the Rothrock.

Q. Now, is there a difference in the appearance of this range in October and in July and in the spring?

A. Yes, naturally, there is in any range country, and in the spring it all greens up, the grass starts its growth. The lower elevations start to dry up and turn brown along in June. The higher country doesn't dry up until, depending on whether it is north or south slope, the north slope stuff won't dry up normally, turn brown, until along in late

(Testimony of D. Everett Phillips.)

July, depending on the season, and, of course, in the fall it is all dry, dry grass. It depends on the season, of course, as to the growth. It is hard to plan too many years in advance whether your grass is going to be a foot tall or eight inches tall at a certain stage of the year. The seasons have a lot to do with it.

The Clerk: I have marked 86 through 94 for identification.

Mr. Swanson: Where is 86?

The Clerk: 87, I should have said.

The Court: 86 is in evidence. 87 through 94?

The Clerk: Yes, through 94.

Q. (By Mr. Swanson): I show you these pictures. Are they [665] or are they not different negatives than any pictures that have been shown?

A. Yes, yes, they were taken by a different person with a different camera.

Q. I show you No. 87. What is that?

A. 87 is one of the higher springs at the base of the Umtanum Ridge. We call this one Mud Springs. It was fenced to keep the stock out and had a trough in it similar to the Buffalo Springs. The springs were very similar. Run the year around, run a good stream of water.

Q. What was the trough made out of?

A. The trough was a steel trough.

Q. Did you have more than one steel trough spring?

A. Oh, yes, yes, we had troughs in several springs, eight to a dozen.

(Testimony of D. Everett Phillips.)

Q. Were they standardized troughs?

A. Yes, regular troughs.

Mr. Swanson: I offer No. 87.

Mr. Hull: Who took this series of pictures and when?

A. I took them.

Mr. Hull: When did you take them, sir?

A. At the same time, the latter part of June and the first part of July in '54. [666]

Mr. Hull: And No. 87 is located where?

A. It is located on the Rothrock side, Section 31. It is in this section (indicating). It would be roughly right north of the center of the section.

Mr. Hull: I have no objection to No. 87. It may be noted I am not putting any limit on the number of pictures.

Mr. Swanson: No, I don't think you have a right to. I think the Court has that to do.

Mr. Hull: We went into that a few days ago. I don't know if these are merely cumulative or what.

Mr. Swanson: They are not.

Mr. Hull: But I think they should come to an end pretty soon.

The Court: We will discuss that sometime in the absence of the jury here. How many more pictures do you have, Mr. Swanson?

Mr. Swanson: I have about 10 more pictures.

The Court: All right.

Q. (By Mr. Swanson): Would you state at

(Testimony of D. Everett Phillips.)

what elevation you state is the year around spring?

What elevation in that section is that?

A. It is quite high.

Q. Can you say from the map?

A. Yes, it would be about 1,500 feet, roughly, 15 to 1,600 feet elevation. [667]

Mr. Swanson: I offer No. 87. It has been admitted?

The Court: It has been admitted.

Mr. Swanson: I'm sorry.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 87.)

Q. I show you No. 88.

A. 88 shows a typical sidehill, yet it shows grass forage, grass cover. Even though it is on a sidehill and quite steep, it has excellent grass, very good cattle feed.

Q. Was that taken before the Army took over? What date?

A. This was taken at the same time, taken in June and July of '54.

The Court: And where, what location?

A. It would be on the Rothrock. It would be in Section 9 on the Rothrock.

Q. (By Mr. Swanson): In Section 9.

Mr. Hull: No objection to 88.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 88.)

(Testimony of D. Everett Phillips.)

Q. (By Mr. Swanson): 89. [668]

A. 89 shows buffalo wallow and shows that there is still some green grass left at that time of the year.

Q. Now, at this point, this is a picture depicting the color at that time? A. Yes.

Q. Is there another picture uncolored here of buffalo wallow?

A. There is another picture taken by the other man.

Q. Would this show the same thing?

A. It would with the exception that this is the realistic picture, this shows the actual grass, what it looked like.

Mr. Swanson: Well, there is no intention to be cumulative here, your Honor. If counsel has no objection, I will introduce this. This is another picture of the same spring. I didn't realize that.

Mr. Hull: It is possible that these colors in your photographs are limited by the limits of color photography? They might not be exactly the same colors as in nature; is that possible?

A. I would say they were very much the natural colors of the range.

Mr. Hull: Did you develop them yourself?

A. Pardon me?

Mr. Hull: Did you develop them or have someone else do that? [669]

A. No, it is regular colored film.

Mr. Hull: Who developed them?

A. Eastman Kodak.

(Testimony of D. Everett Phillips.)

Mr. Hull: No objection.

The Court: As I understand it, though, they are not tinted, simply color film that you take?

A. That's right, it is regular colored film.

The Court: Well, that will be admitted, then.

Mr. Swanson: 89.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 89.)

Q. 90.

A. 90 shows Buffalo Spring, shows some tules growing in the spring and the green grass in the foreground, some dry cheat in the background.

Q. You have another picture of Buffalo Springs here? A. Yes.

Mr. Swanson: I will offer that.

A. Another one in black and white from a little different angle.

Mr. Hull: No objection to 90.

The Court: It will be admitted. [670]

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 90.)

Q. (By Mr. Swanson): 91 is a picture of what?

A. 91 is a picture of the headquarters, the Coffin buildings, showing the corrals, the large shade trees at the headquarters and a few of the buildings. The trees kind of hide the buildings, though, and a wheat field in the background.

Mr. Swanson: I offer 91.

(Testimony of D. Everett Phillips.)

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 91.)

Q. (By Mr. Swanson): No. 92 is a picture of an automobile as far as I can see. A. No. 92?

Q. No. 92.

A. It shows the fish pond before it was drained by the Army. It shows the body of water.

Q. Didn't you have one negative without the automobile in it?

A. No, I don't even recall. That one wasn't taken at the same date, incidentally. That was taken in the [671] wintertime. You see, the trees have no leaves on them.

Q. Well, counsel is entitled to know when this was taken.

A. I would judge in December.

Q. Who was it taken by?

A. I believe my brother took it. I am sitting in the pickup. I believe my brother took that with my camera.

Q. You were present?

A. I am in the pickup, yes.

Mr. Swanson: I offer No. 92.

Mr. Hull: That was last December, you mean?

A. No, that was in December of '53.

Mr. Hull: Of '53?

A. We were down checking on the stock, on the wheat.

(Testimony of D. Everett Phillips.)

Mr. Hull: Well, it is cumulative.

Mr. Swanson: No, it is not. That is another picture of another situation. This one is not cumulative.

Mr. Hull: Where is that located?

The Court: What is it of?

Mr. Swanson: This is of the winter storage of water, your Honor.

Mr. Hull: Where is that located, please?

Mr. Swanson: Fish pond.

Q. Yes, locate that. Unfortunately, there is an automobile in there.

A. It would be just east of the Coffin buildings about a [672] quarter of a mile. Kind of an unusual spring but typical for that country. It originates right on high ground, no gulley or anything.

Q. I understand now that this represents, from your testimony, winter storage of water, is that right?

A. That's right.

The Court: It will be admitted, then.

Mr. Swanson: I offer No. 92, is that?

The Court: 92. It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 92.)

Q. (By Mr. Swanson): I show you 93.

A. 93 shows the spring that feeds that pond. This was taken when the others were in June or July. It shows the vegetation, the green grass.

Mr. Swanson: No. 93, I offer.

(Testimony of D. Everett Phillips.)

Q. That is the spring——

A. That feeds the fish pond.

Q. What period of the year does that spring run?

A. It runs all year long. It is typical of the year around springs.

Mr. Hull: I take it this wasn't taken in December?

A. No, I mentioned that was taken the same time the rest of them were, June and July. [673]

Mr. Swanson: I offer No. 93.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 93.)

Q. (By Mr. Swanson): Now, the last picture is what?

A. It is a lower portion of Alkali Creek showing the creek still running.

Q. In what section? A. In Section 9.

Mr. Swanson: I offer No. 94.

Q. This is the lower portion of Alkali?

A. Yes, that is where it runs out of our property.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 94.)

Q. (By Mr. Swanson): Now, Mr. Phillips, you have, have you, one more exhibit here?

(Testimony of D. Everett Phillips.)

Mr. Swanson: Was this marked?

The Clerk: Not yet.

Q. (By Mr. Swanson): Would you come down and undo this? A. Undress it?

The Court: Well, it is time for the morning recess. [674] I will excuse the jury for the morning recess, then you can unwrap it while they are resting.

A Juror: We haven't finished with the pictures yet.

The Court: All right, I will wait until you finish with the pictures, then I will recess.

Q. (By Mr. Swanson): Are they one exhibit?

A. They are one exhibit.

The Court: You can mark them both the same number, then.

The Clerk: Defendants' Exhibit No. 95.

The Court: All right. All right, are all the pictures through now, gentlemen?

You may retire then for the morning recess.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Yes, the Clerk has put a tag on each one, but it bears the same number so that they are the same exhibit.

You may remain down from the stand, Mr. Phillips.

I might say as to this question of number of photographs, I have never been confronted with the necessity of placing a limitation. Of course, there would be some point where the Court would have to

(Testimony of D. Everett Phillips.)

say this is enough, you can't put in any more photographs, but I do call attention [675] to this fact, that I think the Court should be somewhat liberal, as I have been, in a case of this kind where the taking of the property was, of course, leasehold here in 1950 and the fee, I think, in February, 1954. Considerable time has elapsed and the jury has seen the property now in the fall when I think the Court could almost take judicial notice that the forage is not what it would be at other seasons. I think that there should be considerable liberality indulged in letting the land owner show by photographs what the conditions of the property was at an earlier time and at a different season of the year.

I had that in mind, Mr. Hull, with reference to this larger number of photographs than would ordinarily be permitted, perhaps.

Mr. Hull: I merely mentioned that because I was limited on the number that I put in. There was an objection made because I was putting in too many in my case in chief and I wanted to call that to counsel's attention. You can carry this on a great degree or limit it, as I did.

Mr. Swanson: Just a minute, there was no objection to too many photographs of the same thing, your Honor, and they were of so-called comparable sales, not of this property. Never has an objection been made to any photograph of this property. It is, after all, over 100 square miles, [676] and if

(Testimony of D. Everett Phillips.)

we had 50 photographs, we would only have one to the half square mile.

The Court: Yes, I understand that, it is an exceptionally large area, and for other reasons that I have stated here I wouldn't be inclined to limit either side. I believe, as Mr. Swanson has stated, the objection came up on photographs of comparable land.

Mr. Hull: That's right, but I see no reason for limiting those severely and not the other. I may request an opportunity to put in more photographs of comparable sales later.

Mr. Swanson: Well, I will object to any more than two or three, which he has more than that of some comparable sales, two or three of each comparable sale or each portion of the property of a comparable sale.

The Court: Of course, we have a little different question there on other lands are brought in merely as an aid in determining market value, usually to show the reason for an expert's opinion of market value, and the sole question is whether there is comparability and the degree of it. Of course, here we have directly involved the question of value and use and highest and best use, and so on, but I understood you to say, Mr. Swanson, that you have only about 10 more here, is that correct?

Mr. Swanson: No, I haven't got 10 more, your Honor, [677] I have got a hundred more, but I am only going to put in, I think, about seven or eight is all.

(Testimony of D. Everett Phillips.)

The Court: Yes, I see. I think we should avoid duplication as much as possible.

Mr. Swanson: Yes, I have tried to do that.

The Court: Court will recess then for ten minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the jury:)

Q. (By Mr. Swanson): Mr. Phillips, Identification No. 95 is one exhibit. It consists of two bunches of growth. Would you describe that to the jury?

A. Yes. Those are some wheat samples that came from the Bailey place from the crop of '54. They are a little bit dilapidated now. I have had them in my basement ever since the harvest of '54. These were taken before the wheat was ripe by me. If I would have waited until it was ripe to take these samples, there wouldn't have been anything left, they would have shattered so badly. They were taken from a north slope about the same time that hay was cut, but the hay was on flatter ground. It was a little riper is the reason for the green color. When this wheat is harvested, combined for grain, it is usually cut fairly high; for example, about where the tag here is is about where the header of [678] the combine would cut it off, and that way not getting any more straw in the combine than necessary, and then the chaff, of course, would be dumped out behind, the chaff being this portion around the kernel and short pieces of the

(Testimony of D. Everett Phillips.)

stem and the leaves, of course, whereas if it is cut for hay, it is cut very low, as low as possible to get that much more forage, that much more tonnage, and it looks quite coarse, cutting it for hay, but where it is chopped into short lengths with a hay chopper, it makes very good forage.

Q. Did you cut your hay in the bale there—I have forgotten the number of it—was that cut down where you indicated, very close to the ground?

A. Reasonably so, yes. We went over that pretty fast, we were limited by a time element. The Army didn't give us too much of a time. Normally, it is cut just as low as you can. We drag the ground with the header, normally, to get all we can.

Q. But did you in the field shown by the pictures that the jury saw, did you drag it on the ground?

A. No, no, it was up, oh, several inches in height. We did that so we could travel the gear faster. We were really working against time. We had only two weeks to do all that in, get the hay and the grain out. We were limited on time. [679]

Q. Now, when you cut this hay to harvest the grains, the kernels, you say you cut it up high. Now, how much forage does that leave? Is there a relative—

A. Well, that leaves a lot of stubble, of course. Cutting it high, just getting the heads and the lower sucker heads, not any more straw than necessary, it leaves a lot of forage on the ground that makes a lot of pasture after it rains and softens up.

(Testimony of D. Everett Phillips.)

Q. If it isn't used for pasture, then does it have some other advantage leaving so much forage on the ground?

A. Yes, if it isn't pastured for the livestock, then it is plowed back into the ground. It helps to build the soil.

Q. Oh, by the way, have you any pictures of production or figures in 1952 or '53?

A. As to wheat production?

Q. Yes.

A. Yes, I believe it was around 14,000 bushel that we harvested in '52 for grain. In '53, it was all in summer fallow, of course.

Q. Well, now, I heard a witness, Mr. Conner, state that he had seen records showing only 13 bushels to the acre. Is there some reason why he could be wrong? If so, explain it.

A. Yes, I would say so. We first plowed the lower end of [680] the Bailey place out in '50, out of the brush, and '51 was the first crop, so we re-cropped part of that in '52 and it wasn't as good as it should have been so we pastured a lot of it. We didn't harvest it all that year. We didn't cut any hay in '52 because we were moving out that fall so we run the cattle in on the wheat we didn't harvest and pastured the grain.

Q. The acres of wheat in weren't reflected in the wheat receipts, then, is that what you mean to say?

A. That's right. The total acreage of wheat land would be an unfair figure to base the yield on, being it wasn't all combined.

(Testimony of D. Everett Phillips.)

Q. And without going into allotments, which is out of this picture, did you have that situation that year? A. Allotments?

Q. Yes? As to the cutting of the entire crop or not?

A. No, the allotment wasn't much of a figure in '52. It didn't get too—it was very nominal.

Q. We are not to discuss allotments in this case by stipulation between counsel and the Court.

A. All right.

Q. Have you arrived at a valuation on your holdings as one of the owners?

A. Yes. We talked it over. By "we"——

Q. Just a minute. Have you arrived at a valuation? The [681] answer is yes or no.

A. Yes.

Q. Now, I am going to divert for a minute.

Mr. Swanson: I offer No. 95, your Honor.

Mr. Hull: That is the wheat?

Mr. Swanson: Yes.

The Court: The wheat.

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said wheat sample was admitted in evidence as Defendants' Exhibit No. 95.)

Mr. Swanson: And I have two other exhibits prior to his testimony.

The Clerk: Defendants' Exhibits 96 and 97.

Q. (By Mr. Swanson): I show you Exhibit No. 96 and ask you what that is?

(Testimony of D. Everett Phillips.)

A. That is a lease on mineral rights.

Q. Was that made and executed prior to the time or subsequent to the time that the government took your property away from you?

A. That's right.

Mr. Hull: If the Court please, I object to any testimony along this line. It is immaterial until we have [682] progressed in our case to a decision on that point. As I understand it, he has an opportunity later to introduce that, if it is found to be admissible.

Mr. Swanson: Your Honor, I will take the position this has nothing to do with our conversation in chambers as to the matters counsel refers to. This is the condition of the title at the time of the taking. This displays it.

Mr. Hull: I take the position, if the Court please, and would like to be heard on it——

The Court: The jury will step out for a moment, please.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Do you propose to have this witness testify to the value of the mineral rights?

Mr. Swanson: No, sir.

The Court: What is the purpose, then, of putting in this lease at this time?

Mr. Swanson: To show the fact that they did not have the entire ownership, that the fact is that this ownership was encumbered by two leases at the time of the government taking. This is the very

(Testimony of D. Everett Phillips.)

reason the government has to make two more defendants in this case.

Mr. Hull: I challenge counsel to show that that has anything to do with the use of the surface of the property. [683]

Mr. Swanson: If counsel is only taking the surface to the property, why in heaven's name doesn't the government let us try the other at a different time?

The Court: I don't know why, Mr. Swanson, that we agree on things in chambers and then you come out here and do exactly the opposite thing. You do that again and again. You are very, very difficult from a court's standpoint for that reason. You know very well that what I had in mind was that this be brought up at a time when I could rule on it as a matter of law, and yet you insist on sliding it in here to the jury, contrary to our definite understanding in chambers this morning, this very morning.

Mr. Swanson: I disagree with your Honor's premise.

The Court: A lawyer has a duty to his client, but he also has a duty to the Court to have some consideration for agreements that are made in chambers.

Mr. Swanson: Your Honor, if your Honor please, I have made no agreement in chambers or any place else that I would not show the actual facts of this case, which are the condition of the title. As to value of mineral rights, I haven't pur-

(Testimony of D. Everett Phillips.)

ported to say that this witness will testify to it. It is just he is one of the witnesses that signed something that affects his title. If he gets off this stand, I can't do it again. [684]

The Court: All right, if this is admitted in evidence, it is entitled to be read to the jury and to be sent with them to the jury room, and the agreement was that they would not be offered until the Court had ruled on the offer of proof.

Mr. Swanson: Then, I will offer to present these for your Honor's consideration and you may rule as you choose.

The Court: Well, sustain the objection to their offer or any testimony regarding them at this time, with the understanding that counsel may produce them later in connection with his showing of mineral values.

Mr. Swanson: May I make an offer?

The Court: All right, you may make an offer of proof.

Mr. Hull: May I offer a suggestion, also, that the condition of the title is not an issue for the jury in a condemnation case.

The Court: I had understood not. I think it is for the Court to determine what the relative rights of different interests are and that all we are concerned with now is not the title but the compensation to be paid for the whole value of the land.

Mr. Swanson: I have an offer to make.

The Court: All right, make your offer. [685]

Mr. Swanson: I offer Identifications Nos. 96 and

(Testimony of D. Everett Phillips.)

97. 96 is an option for mineral rights lease which encumbered this title at the time the government took title to this property in February, 1954. I offer the oil and gas lease which was executed by the owners of this property to the Shell Oil Company prior to the time that the government took this property in 1954.

It is the theory of this offer that this jury should find the whole value of everything of this property that is taken—mineral rights, underground, surface and everything else—and that a division later is made between the parties to the lawsuit, all of the defendants.

This witness is on the stand for the last time, he is one of the last of the owners, and I offer these at the last of his testimony as a fact. I have stipulated in chambers that I would not give testimony of value as to these, but the fact of their existence I offer to prove by these two exhibits.

The Court: You may recall the witness, if necessary, to identify the documents later on.

I assume that you are objecting, Mr. Hull?

Mr. Hull: I am, I object. It becomes apparent from counsel's offer that these two documents are submitted for the purpose of proving a value, and it is the position of the government that those documents are not competent [686] evidence to show value of mineral rights or the minerals underground unless there is a foundation laid for them, which we have discussed many times.

I make the further objection on the ground that it is my understanding that no evidence along the

(Testimony of D. Everett Phillips.)

line of gas and oil values or other mineral values was to be offered on either side until the question had been determined on a formal offer of proof.

Mr. Swanson: I, further to clarify my offer, want to state this: I have stipulated that I will not give evidence as to the value of approximately 6,000 acres of mineral rights which are to be mentioned to this jury as out of this case. I have not stipulated, until further agreement with this Court and counsel, that I would not show the entire ownership of the property, which can be divided between the proper defendants after this jury's verdict, whatever proportion is proper. I have no concern——

The Court: Are you through, Mr. Swanson?

Mr. Swanson: Yes, your Honor.

The Court: I take the position that the existence of these prospecting leases becomes material only in the event it is shown that there are mineral right values or minerals of substantial value in the property, and that if there isn't anything shown on which there could be compensation for minerals, the fact that there are mineral leases [687] is immaterial.

So far as the railroad's reservation of rights is concerned, if the Court takes the position that there are no minerals in this land that could be shown of sufficient value to warrant submitting their value to the jury, then it is not necessary to disclose to the jury that there is any reservation so far as the railroad is concerned, but the jury will find the full

(Testimony of D. Everett Phillips.)

value of this property on the basis of what value could be shown there at its highest and best use.

Mr. Swanson: I have one further addition to my offer.

Both of these documents show that there is paid in advance a sum of money and that there is some amount that is attributable to the so-called by the Court prospective or possible value to these oil and gas leases. There is a definite amount of leasehold, be it only for the balance of the year, that this jury it entitled to know, my stipulation to the contrary, whatever it is supposed to be.

The Court: That is not an offer but an argument. The leases will show whether there is compensation paid for them. You have only stated what is shown by the leases and you are offering the leases, so what you are doing is making an argument rather than an offer at this time. [688]

Mr. Swanson: Showing what the offer is.

The Court: I don't care for an extended argument at this time. Complete your offer and I will make my ruling.

Mr. Swanson: The offer, completed, is that there is on these leases as a year to year lease——

The Court: Well, doesn't the lease show what it is? You are offering the lease, I am assumed to know what is in it.

Mr. Swanson: And that based upon these leases, checks are written which have been written for a year in advance, and those are admissible. I was going to keep them out.

(Testimony of D. Everett Phillips.)

The Court: Well, you are offering, then, to show checks as payments that have been made?

Mr. Swanson: In advance.

Mr. Hull: At the time of the taking?

Mr. Swanson: At the time of the taking, yes, your Honor.

Mr. Hull: That line of evidence is also objected to on the ground that it is not competent evidence of subsurface or mineral values without, as I say, the proper foundation under the cases cited.

The Court: Well, what the Court is doing here is simply reserving ruling on this matter until [689] the question can be presented and decided as a question of law, whether the issue of mineral value should go to the jury, and it is perfectly obvious why I wish to have it done in that way, and I will sustain the objection at this time, with the understanding that the defendant land owners have the right to renew their offer at any future time it becomes proper under the Court's theory.

Mr. Swanson: Will you allow an exception, your Honor?

The Court: Well, you don't need an exception. If you read your Rules of Civil Procedure, you need not take an exception. If you feel better to make it, you can make it and it will be put in the record.

The Court may say also that you are taking an inordinate amount of time with this witness. I don't know whether you are concerned, afraid you will run out of witnesses, but don't be concerned on that

(Testimony of D. Everett Phillips.)

score, Mr. Swanson, because if you run out of other witnesses other than your mineral rights experts, I will suspend until we get through until tomorrow morning.

Mr. Swanson: I hadn't appreciated that I was taking too much time and I hadn't intended to. I am almost through with this witness and I have plenty of witnesses, I am not running out of witnesses.

The Court: I see, all right. Bring in the jury.

Mr. Swanson: I understand, your Honor, I am not to mention these two identifications at this time?

I will void that remark, we will do it later.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Q. (By Mr. Swanson): Mr. Phillips, have you arrived at a price which is your consideration of the market price of this land at the time it was taken?

A. I have.

Q. And have you divided that price as to classifications of land?

A. Yes, the range land, improved wheat land and potential wheat land.

Q. Speaking first then of the range land, will you testify as to your valuation of the range land?

A. We placed a valuation of \$20 an acre on the range land, giving a total of \$495,162. On the improved wheat land——

Q. Now, just a minute. I asked about the range land first. In consideration of that, your value of

(Testimony of D. Everett Phillips.)

the range land, did you consider the fact that there is additional ground to be used for forage?

A. Yes. There is the residue of the wheat land to be used. [691]

Q. Now, about the wheat land, have you arrived at a figure on that?

A. Yes, on the 995.5 acres of improved land, we have placed a price of \$135 an acre, for a total of \$134,402.

Q. Have you a picture of that wheat land that you are so valuing now? A. Yes.

Q. I show you No. 98.

A. 98 shows a picture of the wheat just west of the Coffin buildings in the latter part of June or the first part of July, 1954. It shows the wheat still in the green stage, the dough is just in the kernels.

Q. And what is 99?

A. 99 is a picture of similar wheat at a like time. It is on the Bailey place, a little bit to the east of the Bailey buildings.

The Clerk: I have marked 98 to 104.

Q. (By Mr. Swanson): Now, 98 is at what place and in what section and range?

A. Exhibit 98 is east of the Coffin buildings in the north half of Section 14, 13, 22.

Mr. Swanson: I offer No. 98.

Mr. Hull: That is the first one?

Mr. Swanson: Yes. [692]

Mr. Hull: No objection to 98.

The Court: It will be admitted.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 98.)

Mr. Hull: I do have an objection to No. 99.

Mr. Swanson: All right.

The Court: If the Court may see it.

Mr. Hull: Because of the perspective and the use of an object at middle distance. The angle of perspective is impossible to determine and therefore it is objected to as not being a true picture.

The Court: Well, I think it may be admitted, objection overruled.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 99.)

Q. (By Mr. Swanson): Now, No. 99 is taken where? Did you identify the place?

A. 99 is taken east of the Bailey Ranch in the north half of Section 20, 13, 23.

Q. 99 is the Bailey Ranch and 98 was what ranch?

A. The Coffin Ranch.

Mr. Hull: May I ask here at this point——

Mr. Swanson: Yes, just a minute. [693]

Mr. Hull: ——at what height above ground was the camera held? Did you take that picture yourself?

A. Yes.

Mr. Hull: ——at what height above ground was it taken?

A. It was taken with a 35 millimeter camera, it had to be at eye level.

Mr. Hull: At eye level?

A. Yes.

(Testimony of D. Everett Phillips.)

The Court: Your eye level, is that? A. Yes.

Mr. Hull: You mean by that that you were standing right on a level with the field?

A. That's right.

Mr. Hull: And taken at this height above ground, then, is that it?

A. Yes, you are, no doubt, familiar with that type of camera. It has to be held against your face, against your cheek.

Mr. Hull: All right, that is all.

Q. (By Mr. Swanson): I show you 100. That is a different view of a different area?

A. Yes. That was taken by another photographer, another camera, and shows another field east of the Bailey buildings in Section 18. [694]

Mr. Hull: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 100.)

Q. (By Mr. Swanson): Now, in regard to your valuation on the wheat land, have you pictures of the harvest? A. Yes.

Q. I show you 102, 103, 104 and—excuse me, 101 to 104, inclusive.

A. 101 is a picture of some wheat trucks, semis, loading out grain out of our storage on the Coffin building, the metal granary.

Q. That metal granary, where is that situated?

A. It is on the Coffin Ranch.

Q. Is it still there?

(Testimony of D. Everett Phillips.)

A. Portions of it are still there. This picture shows the grain running out of the auger into the truck.

Q. Is the auger a part of the machinery in the building? A. No, no, it was a portable auger.

Q. Portable auger. Is that the manner that you load trucks? Testify to that.

A. Yes, these augers are used quite frequently to load trucks. They are portable and very fast. They move a lot of grain in a short while. [695]

Q. Don't you load your trucks in sacks?

A. No, no, it is all bulk.

Q. The next one is 102.

A. 102 shows two combines harvesting on the east end of the Bailey Ranch in Section 20. Both of these particular combines are pull type, pulled by crawler-type cats.

Q. The next one.

A. 103 shows wheat land on the Bailey Ranch taken on the hill north of the Bailey Ranch over the top of the orchard, showing the wheat ripening on the opposite slope.

No. 104 shows two of the combines, the pull type and the self-propelled, at noon.

Mr. Swanson: I offer 101 to 104, inclusive. These are identifications as to place, your Honor, by name of the ranch. I assume that is close enough.

Mr. Hull: No objection.

The Court: They will be admitted, then.

(Testimony of D. Everett Phillips.)

(Whereupon, the said photographs were admitted in evidence as Defendants' Exhibits Nos. 101 to 104, inclusive.)

Q. (By Mr. Swanson): I show you 98, what is that?

A. Exhibit 97 is a picture of an alfalfa [696] field on the Bailey place on the south half of Section 18, 13, 23.

Q. Is that a different hay field than has been testified to before?

A. Yes, before the hay field was of grain. This is alfalfa.

Q. How many acres do you have in alfalfa?

A. I don't know exactly. Very few.

Mr. Swanson: I offer 97.

The Clerk: What is that number?

Mr. Swanson: 97. I took that out of order.

Mr. Hull: No objection.

The Court: It will be admitted, then. That is 97.

(Whereupon, the said photograph was admitted in evidence as Defendants' Exhibit No. 97.)

Q. (By Mr. Swanson): Now, have you testified as to the value of the improved wheat land?

A. Yes.

Q. Other than the improved wheat land, have you determined how much unimproved wheat land, if any, there is on this ranch?

A. Yes, we have determined there are 2,230 acres of unimproved wheat land on the Rothrock in what we term the basin area, and on the Coffin Cold

(Testimony of D. Everett Phillips.)

Creek side we have determined 5,230 acres, or a total of 820,600 dollars. [697]

Q. What price did you arrive at per acre?

A. We arrived at a \$110 per acre amount.

Q. Why the difference of \$25 an acre between that land and the improved land?

A. We allowed \$15 an acre for railing and plowing and getting the brushland under cultivation and an additional \$10 for the allowance on the first crop. Virgin soil being rich in nitrates, nitrogen, the first crop usually burns to a certain amount unless it is an unusually wet year, so we allowed \$10 for the lower yield of the first crop.

Q. Now, in the first leasehold taking, being number—you have the number there?

A. No. 452.

Q. No. 452.

A. Consisted of 4,086 and a fraction acres.

Q. That was the blue section on the map, was it not?

A. Yes.

Q. I will ask you first if that isolates any other portion of your land?

A. Yes, as has been testified before, it isolated the brown area over on the west. That one mile strip running north and south, it isolated that completely.

Q. What is the damage and severance, if [698] you have connected them, and if you have, state why by reason of that taking in 1950 in January?

A. We lumped them up, that is, lumped the severance and the leasehold. We went on a total

(Testimony of D. Everett Phillips.)

carrying capacity basis and figured it that way, rather than a per acre. It is hard to arrive at a per acre basis. Most all range is leased either by a lump amount or by the animals, so much per head per month. We arrived at a figure basing it on one-eighth of the carrying capacity of the ranch, we arrived at a figure of \$22,000 for that leasehold.

In Case No. 488——

Q. Now, just a minute——

The Court: That is annual?

Q. (By Mr. Swanson): That is annual?

A. Yes.

The Court: On an annual basis?

A. On an annual basis.

Q. (By Mr. Swanson): Now, what factors do you take into consideration in making such an amount?

A. We take into consideration the factors that it was of the better part of the range, the higher elevation, and also that it was in the area where the hay land or wheat land was and that the residue or possible residue of the wheat or what harvest makes additional forage. [699]

We figured it on that basis.

Q. Was there some wheat land in this taking?

A. Yes, there was some wheat land in this taking.

Q. As a factor of value, do you consider the current price of wheat per the year?

A. Definitely. Wheat fluctuates. If you are fig-

(Testimony of D. Everett Phillips.)

uring the yield or the take off of a given piece of wheat, the year has something to do with it.

Q. The price during that year?

A. The price during that year was around——

Mr. Hull: I object to that.

Mr. Swanson: No, just a minute, I haven't asked you what the price was.

Q. The price during that year, does it affect your judgment of the value of the land as a factor?

A. Oh, definitely. If the wheat was way down, naturally, if you were renting, you wouldn't pay as much as if the wheat were higher, say 50 cents a bushel higher for comparison.

Q. As a factor of your valuation of the hay land, is the price of hay a consideration?

A. Yes, definitely, hay prices always fluctuate. The hay that you could get off of a given piece of ground valued at \$20 an acre wouldn't be worth, the potential ground wouldn't be worth near [700] as much as if you were assured \$30 a ton.

Q. Now, I don't know whether I made a stipulation or not, but don't answer this: I am going to ask you what the price of grain as a factor in the valuation of this land was during that year?

The Court: During what year?

Mr. Swanson: During the year 1954, the year of the taking, and also during the year of 1950, the year of this severance.

Mr. Hull: Objected to as being immaterial and improper.

The Court: Sustain the objection.

(Testimony of D. Everett Phillips.)

Mr. Swanson: You may answer.

A. Give the amount?

Q. Give the price of grain during the year.

The Court: I said I sustained the objection.

Mr. Swanson: Oh, I'm sorry, I didn't hear, your Honor.

The Court: Yes, all right.

Mr. Swanson: I'm very sorry.

The Court: All right.

Q. (By Mr. Swanson): I don't mean it as an offense, but for the record I must ask, do you know what the price of hay, wheat hay, was in the year 1950, if it was a factor that you used in pricing your land? A. Yes. [701]

Q. Don't answer this: What was the price?

Mr. Hull: Objection.

The Court: I will sustain the objection.

Q. (By Mr. Swanson): Now, the next case is number what? A. 488.

Q. 488 is the case of the severance on July 1, 1950 of 3,000 and some acres of land. Have you arrived at a figure for leasehold and severance on an annual basis for that case?

A. Yes. That case in question being the one on the extreme west, it was out of our use actually at the same time the first leasehold was. We didn't have access to it. I figured on the same basis of the carrying capacity and arrived at an annual of \$18,000.

(Testimony of D. Everett Phillips.)

Q. Now, what carrying capacity rate do you use as a factor?

A. I have used the factor of 2,000 head carrying capacity.

Q. Now, what does 2,000 head mean?

A. 2,000 head of grown animals and their calves.

Q. 2,000 animal units. That is as Mr. Conner testified 1,000, I believe. A. Yes.

Q. You are testifying to the use of the whole ranch, are you, for 2,000 head? [702]

A. Yes.

Q. Is your testimony based on experience?

A. Yes, I have based it on the experience of leasing pasture land, what it costs you roughly per head to lease pasture land.

Q. On what basis are leases made, if there are leases of pasture land in your area?

A. Depending on the location and different factors, it varies.

Q. No, on what basis, per acre or per head per month? A. Per head per month.

Q. What is the value per head per month?

A. Currently, it is \$5.

Mr. Hull: I object to that line of testimony. We are getting right back where we were before, it seems to me.

Mr. Swanson: Is counsel——

The Court: I think not.

Mr. Swanson: His witness brought out some of that your Honor.

Mr. Hull: Not any price per head.

(Testimony of D. Everett Phillips.)

The Court: The witness has testified that that is the basis of rental. I think he is permitted, should be permitted. I will overrule the objection.

Mr. Hull: I object to this method of [703] valuation, your Honor. The method of valuation on leasehold, as well as fee, as I understand it, is on the market.

The Court: Well, he has said that the market, the customary lease is by head, so much per month per head.

Mr. Hull: The comparable sales, as a comparable lease basis, is the only one I thought the Court recognized on this type of case.

The Court: It is one, not exclusive. It is one factor, it isn't the only one. I will overrule the objection.

Q. (By Mr. Swanson): On a per head per month basis, have you arrived at your figures?

A. That's right.

Q. Are your figures proportionate to acreage on that basis? A. That's right.

Q. I will ask you on the next case, 762, that is the taking of 6,068 acres in 1952, what is the annual leasehold and severance value of that taking, if you are able to arrive at it?

A. Yes. That consists of a larger taking, a larger block of land. Consequently, it would cut into the total carrying capacity of the ranch more. Figuring on that basis, I arrived at a figure of \$30,000 for an annual severance and leasehold. [704]

(Testimony of D. Everett Phillips.)

Q. Is that based upon an actual computation of per head per month at \$5?

A. Yes, figuring a base of 2,000 head for the total ranch and the fraction thereof taken away, is what we arrived at.

Q. How many head did you actually run on half the ranch?

A. We actually ran in excess of a thousand head on half of the ranch.

Mr. Swanson: You may inquire. Oh, there is one more thing:

Q. The severance to the remaining—it was green area in the former exhibit—the severance to the remaining acreage that you have, a little end that is left to you not taken by the government, is there any damage to that?

A. Yes. We figured that there would be a \$3 an acre damage to what was left based on a \$20 asking price, \$20 valuation, which would amount to \$10,080.

Q. Why do you say it is worth \$17 after the taking?

A. Because just south four to five miles, land has sold for around \$17 very near the subject matter.

Q. Subject property?

A. Subject property.

Q. And why is it worth \$20 an acre connected to the range?

Is there a greater value? [705]

A. It is definitely a valuable portion of the

(Testimony of D. Everett Phillips.)

block in so much it is the winter range, the lower elevation feed for wintertime.

Mr. Swanson: You may inquire.

The Court: I think it is too late to start in on cross-examination now. I will excuse the jury until 1:30.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I always like to inform counsel as accurately as I can the view that the Court takes and what will likely be the instructions so they may govern the introduction of evidence and your arguments accordingly, and this matter of leaseholds, particularly several leaseholds on the same property on which the fee was taken, makes a rather awkward situation and an unusually complex situation, but it is my view and I intend unless counsel can persuade me otherwise to instruct the jury, so far as these leaseholds are concerned, they are to find the cash market value of the leasehold from the standpoint of the government as tenant.

Mr. Swanson: I didn't hear the word?

The Court: From the standpoint of the government as tenant, the value of the leasehold to the tenant at the time of taking. That is to be governed in each case as of the time of taking. [706]

I appreciate the fact that these leaseholds contained a provision that they could be renewed annually, giving notice, for almost an indefinite period, that is, for the emergency plus some additional time, and in many cases these leases or leases

(Testimony of D. Everett Phillips.)

similar to this did run for a great many years, but I don't think that that would affect the amount of compensation that a jury should find or that the jury should have to be called in annually to reassess the rental value. I think these leases, regardless of how long they may have run by their terms, considering the power or the right of renewal, that the value we are to find now is on no different basis than if we had by some miraculous procedure been able to call a jury in here the day after the government took these leaseholds and had the jury at that time find the value.

And this matter of price, if there is to be any influence on market prices of wheat and hay, I think it would be in the years preceding rather than the years following the date of taking, because how could two hypothetical persons, a buyer and a seller, getting together on the day of taking, how could they take into consideration what the price of hay or what was going to be a year from then? That doesn't—

Mr. Swanson: I am ashamed of myself.

The Court: Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

1:30 o'clock p.m., Wednesday, November 2, 1955.

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had in the presence of the jury:)

(Testimony of D. Everett Phillips.)

The Court: Will counsel step up to the bench just a moment, please.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury before the bench:)

The Court: I intended to mention this just before we recessed, but overlooked it. Mr. Granger now has two No. 97's. He marked one, the oil lease, 97. Would there be any objection to changing, crossing this out and make it 105?

Mr. Swanson: He explained that to me. It is satisfactory to us. [708]

Mr. Hull: Yes, that is proper.

Mr. Swanson: 97, the picture of the alfalfa land, is changed in number to Exhibit No. 105, is that agreeable, counsel?

Mr. Hull: Yes.

The Court: It will stand admitted, then, as such.

(Whereupon, the photograph formerly and admitted as Defendants' Exhibit No. 97 was marked and admitted as Defendants' Exhibit No. 105.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: All right, proceed.

Cross Examination

By Mr. Hull:

Q. Mr. Phillips, yesterday you were referring to this Map No. 54 with reference to crop lands which had been broken out prior to the date of taking, de-

(Testimony of D. Everett Phillips.)

scribing the fields. I wonder if you would now take a crayon and mark those crop lands on this map as best you can?

A. They will be pretty rough. (Drawing on map.)

Q. Were there any west of Section 10 at all?

A. No, Section 10 was the westernmost.

Q. Farther west. Then you have marked out on Map 54 your [709] best recollection, using blue crayon, of the crop lands which were actually under cultivation?

A. That's right.

Q. As of the date of taking. Thank you.

Now, I don't recall the number of the photograph, I think it was in the early 70's, a picture of an old irrigation flume. Is this No. 73 the irrigation flume that you spoke of?

A. It is the remnants of it, the flume and the old pipe, yes.

Mr. Swanson: Will you speak louder, please, so they can all hear you?

Q. (By Mr. Hull): What was the circumstance with reference to this irrigation flume? Was it in use for irrigation during any time that you occupied the ranch?

A. Yes, Bailey, the former owner of the Bailey place, had used it to irrigate in the spring of '49. After the high water washed it out in '50, we never resumed it.

Q. You did not use it for irrigation purposes?

A. Not—no, we didn't ourselves.

(Testimony of D. Everett Phillips.)

Q. You had no land under irrigation, as I understand it? A. That's right.

Q. With reference to the springs or water sources, particularly above the elevation of, say, 2,500 feet along Umtanum Ridge, were there more on the north side [710] or the south side of that ridge? A. Above 2,500?

Q. Yes?

A. Pretty close to the same, I would say, maybe perhaps a few more on the north.

Q. Could you give any proportion on that from your recollection?

A. No, they would balance off pretty well, one off against the other.

Q. It is possible, though, there were a few more to the north, would you say?

A. It is possible, yes.

Q. I realize you didn't check that. In your reference to your figure on the carrying capacity of the Phillips-Haggerty Ranch here, the figure you gave, you stated, was based on your experience. Was that your experience with reference to other ownerships?

A. No, on our own ownership.

Q. Was the figure 2,000? A. Yes.

Q. Had you for any year run, actually run, 2,000 head on this place? A. No.

Q. Now, when you computed your leasehold valuations, Mr. Phillips, and the severance in arriving at the three [711] figures that you have given us, take the first Case No. 452, if you recall, that would

(Testimony of D. Everett Phillips.)

be the area taken for lease indicated in blue on one of the earlier maps, how many acres were taken in the lease in that case, if you recall?

A. Something over 4,000, I believe.

Q. And as to how many acres did you then compute severance?

A. As I stated earlier, I didn't use the acres, I used the total potential carrying capacity of the ranch.

Q. Well——

A. And when that portion, roughly, as it was stated by Mr. Conner, the best grass was up at the western end of the range.

Q. My question is just as to the acreage affected by severance?

A. I didn't base it on acreage, I based it on carrying capacity.

Q. Well, as to the first leasehold, then, we have approximately 4,000 acres taken for lease and approximately 36,000 in the entire ownership, was there not? A. Yes.

Q. Then in computing as to severance on the second leasehold, that was about how many acres?

A. Something over 3,000. [712]

Q. And as to what area do you compute your severance, then?

A. As stated before, I based it on the total carrying capacity of the ranch.

Q. Of the entire ranch?

A. Of the total, used that as a base to figure what percentage was taken away.

(Testimony of D. Everett Phillips.)

Q. From the entire ranch?

A. That's right.

Q. As you did the first one? A. Right.

Q. And as to the third lease, that was about how many acres?

A. Something in excess of 6,000.

Q. And how did you compute the severance in that case?

A. Very much the same way, on carrying capacity of the forage.

Q. Of what portion of the ranch? The entire ranch?

A. Using the base figure again of total potential.

Mr. Hull: That is all.

Redirect Examination

By Mr. Swanson:

Q. Why didn't you run 2,000 head on this place, as counsel asked?

A. For two reasons; one, part of it was taken over by [713] lease shortly after we had possession, and the second one, with the Army dragging their guns back and forth through the property from the firing center to Hanford and with the rumors that the Army was going to reactivate everything there, we never did develop it fully.

Q. You have answered how many you did run.

Mr. Swanson: That is all.

Mr. Hull: That is all.

(Witness excused.) [714]

* * * * *

D. EVERETT PHILLIPS

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Swanson:

Q. Mr. Phillips, have you severed your mineral rights from your property?

A. Yes, we have.

Q. To a partnership by some name?

A. Yes.

Q. What is the name of that partnership?

A. Regimbal—

Q. No, no, the partnership that you severed?

A. I don't follow you.

Q. Is that a mineral rights deed, that Exhibit No. 120, from Phillips and Haggerty to Phillips and Haggerty and a stranger in the title?

Mr. Hull: What is his name?

Mr. Swanson: His name is Walter Swanson.

A. That's right, they were severed and joined under a separate company, Cold Creek Company.

Q. There is a Cold Creek Company?

A. That's right, Cold Creek Company.

Q. Does that company now own the mineral rights on your range? A. Yes.

Mr. Swanson: I offer No. 120.

Mr. Hull: No. 120 is objected to as being incompetent, immaterial and irrelevant to the issues in this case.

The Court: Well, I will admit it for the sole purpose of consideration by the Court as to the state

(Testimony of D. Everett Phillips.)

of title, but will reserve ruling as to whether it will be submitted to the jury.

(Whereupon, the said deed was admitted in evidence as Defendants' Exhibit No. 120.)

The Court: Let's see, there are some others there.

Mr. Swanson: There are two more I will identify.

And now, the ruling is reserved or——

The Court: It is admitted for the purpose of consideration by the Court as to the title, but as to whether it will be submitted to the jury, ruling will be reserved until later on.

Q. (By Mr. Swanson): I hand you No. 96 for identification. Will you state what that is? [929]

A. That is a lease for the mineral rights.

Q. From what company?

A. From the Gamble Peet Company.

Q. No, from the owners of the mineral rights, who is that?

Mr. Hull: The document speaks for itself, if the Court please.

Mr. Swanson: I have to identify it.

The Court: I think we can identify that as being executed by the owners. I think that is sufficient.

Mr. Swanson: Owners is all right.

Q. To whom?

A. From Phillips and Haggerty and Walter Swanson to Regimbal for the mineral rights.

Q. That is a lease, is it?

A. It is a lease of the mineral rights.

(Testimony of D. Everett Phillips.)

Mr. Swanson: Do you want to see it?

Mr. Hull: Is it a lease or an option?

Mr. Swanson: It speaks for itself. It is an option for a lease, your Honor.

The Court: You make the same objection, Mr. Hull, I assume?

Mr. Hull: I do, your Honor.

The Court: I will make the same ruling as I did on 120. It will be admitted for limited purposes. Ruling will be reserved as to whether it will go to the jury. [930]

(Whereupon, the document was admitted in evidence as Defendants' Exhibit No. 96.)

Q. (By Mr. Swanson): I will hand you No. 97 and ask you what that is?

A. This is also a lease for mineral rights.

Q. From who to who?

A. From the owners, Phillips and Haggerty and Swanson, to the Shell Oil Company.

Q. And what is the date of that?

A. The 7th of November, 1953.

Mr. Swanson: I offer No. 97.

Mr. Hull: Same objection, your Honor.

The Court: Same ruling, it will be admitted for the consideration of the Court at this time; ruling reserved as to whether it goes to the jury.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 97.)

* * * * *

Mr. Swanson: Now, I have, your Honor, reached the end of the defendants' case except for an offer of proof which we have discussed.

The Court: Very well.

Mr. Hull: Pardon me just a moment.

The Court: Yes, all right.

Mr. Hull: We have no rebuttal.

The Court: All right, I see. I will excuse the jury then at this time.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: There are two ways that this can be done—you can call your witness and progress as far as you can with him and have the objection made and then the offer of proof made in the absence of the jury. However, since this has been discussed several times in chambers, I wondered if we couldn't simply have the offer of proof made, if you are willing to proceed that way, Mr. Swanson.

Mr. Swanson: I am willing to stipulate that it is not necessary for me to put the witness on the stand. I might go too far in your Honor's opinion or mine or [935] counsel, and we can avoid that by not having him put on the stand.

The Court: You have no objection to the record showing that Mr. Swanson's rights are fully preserved by him making this offer of proof in the absence of the jury without putting a witness on in the presence of the jury?

Mr. Hull: Oh, of course.

The Court: And I think, too, if you wish to put

it in that way, you could offer to prove by specific witnesses.

Mr. Swanson: Yes.

The Court: Might make it more specific if you made your offer that way, or you can make it as a whole. It doesn't make any difference to me.

Mr. Hull: May I then say for the clarification of the record that on the part of the government we will not contend that the defendant has waived any right which he might have preserved by putting on the witnesses to whom he will refer.

The Court: I see, all right.

Mr. Swanson: Now, if your Honor please, it is in the evidence in this case, different than some others, this fee that is being taken by the government has been separated by a severance of the mineral rights, that is, the deed to the Cold Creek Company. It is the law that [936] there must be a stranger to the title in order that there may be a severance of the mineral rights from the fee. Thenceforth the mineral rights create and start a separate chain of title from the date of that severance. That separate chain of title which is started is encumbered by two leases, one is an option for a lease, both of which are precedent to the filing of the declaration of taking by the government of the entire ranch. One is an option for a lease and another is an actual lease—I don't have the numbers here now before me—an actual lease to the Shell Oil Company for an amount certain per year, thereby creating this situation:

The necessary defendants in this condemnation are not alone the original owners of the fee, but

they are the owners of the separate title, estate title, of the fee, of the mineral interests, and the owners or any lessees of the mineral interests, as well as any other lessees whose leases are recorded for a period of years, they don't happen to be just the ones in the mineral lease, and there are two of them so they are also defendants in this action—myself, the Shell Oil Company, and the Regimbal who took the option in behalf of another company.

Now, it comes to this position: Do these defendants and additional defendants have a thing of [937] value, having severed their mineral rights and having become defendants in another sense in this lawsuit?

I offer to prove—I feel it is my obligation to present this to your Honor, the law that I have been able to find and I have now found some, with some assistance—I will make my offer to prove first and then I will make my argument, if that is proper.

The Court: Yes, I think that is the logical sequence.

Mr. Swanson: I have here Mr. Valentine of the Shell Oil Company, a geologist——

The Court: What was his name?

Mr. Swanson: Valentine.

The Court: Initials?

Mr. Swanson: I do not have them.

The Court: Well, that is all right.

Mr. Swanson: I will get them for you.

The Court: That is all right. Yes, all right.

Mr. Swanson: He is a working, operating geologist working in the field in charge of geology for

Shell Oil Company for other portions of the state and area, in addition to this portion here. He was in charge of and is familiar with the geology of this particular area.

He will testify that there are several factors which govern the decision whether or not to drill and [938] explore for oil. Those factors can best be heard from his testimony. Drilling for oil can and has been decided upon by major companies with as few as one of the three or four factors. There are more than one of the factors present in the area here, one of which being a source bed and another of which being an anticline area with a closure.

As to the existence of gas or oil in an anticline area with an enclosure with one or more of the other factors present, it is only, whether it is a professor in a college or the highest priced geology man that we can get, is only a guess, and that will be his testimony. Probability and the presence of those factors will be his testimony.

His testimony will also show that he is corroborated and his company organization is corroborated in this finding by the geology departments of—I believe it is five other major companies—Ohio Oil Company, Texas Company, Richfield, Standard, and one more, in addition to Shell; that all of those companies have leased lands in these areas—in this area, in this particular area; that this area does, therefore, constitute an active leasing area of common knowledge among oil people and owners of real estate.

As part of my offer of proof, there is proof in

this case, which is the dealing in reservations of [939] mineral rights, the recent sales of lands that we have mentioned south of this and adjoining this property have all had a reservation of mineral rights in each case.

The next witness will testify not as a geologist, but as what is called a land or lease man. His name is Mr. Beam. He was formerly with the Carter Oil Company, Standard Oil Company, and now is on loan, I believe, to Northern Pacific. His home is in Billings; he has come here to testify. He will testify that persons of ordinary business judgment invest in mineral estates upon which there are leases by major oil companies; that there are companies organized that do only that business of investing in all or a part, such part as they may obtain of the mineral estate underlying the leases of the major oil companies.

Now, my offer of proof is mindful of one factor and that is this: In any major oil company lease, the oil company, your Honor, has the right to cancel the lease, they reserve that right, the first year, the second year, or the third year of the usual ten year lease. Some of them are five year leases.

The Court: That provision is contained in these leases?

Mr. Swanson: In every lease in the whole area.

The Court: I mean the leases in evidence? [940]

Mr. Swanson: And the oil company lease that is in evidence it is in.

The Court: Yes.

Mr. Swanson: In the option for a lease, no, it

isn't. Wait a minute, maybe it is, at that. Yes, it is also in the option for a lease in the form that is just a standard form as appended to the option for lease.

He will testify that there is a value, that those rights have a real value. Where there has been a strike of actual oil or gas, it becomes a very heavy value. In an area which is—let us call this a wildcat area, your Honor, it is only degree, it is far less in value, but nevertheless there is a value to the mineral estate under the geology of a major oil company. He will testify to that and he will testify that there is dealings in such rights in areas similar to this where there has not been a strike of oil.

Now, I believe it my obligation to the Court, after having made my offer of proof, to give the Court the benefit of my authorities.

The Court: Yes, all right. First, Mr. Hull, I think we should know whether you object to the offer of proof or not. I think that is necessary to complete the record. If you make no objection, then, of course, the witnesses will be called to testify.

Mr. Hull: Well, I want to make a record. I do enter an objection to the offers of proof and point out some of the grounds.

The Court: Well, if you will just make your objection for the record at this time and then state the grounds of them, then we will hear the argument later.

Mr. Swanson: Very well.

The Court: First Mr. Swanson, then you may reply.

Mr. Hull: Any of the proffered evidence and all of it is objected to on the grounds that it is entirely incompetent, immaterial and irrelevant, and none of it is a basis upon which court or jury could establish any value upon the mineral rights in this case. I will make my argument later.

The Court: All right. Mr. Swanson, pardon the interruption, I think we should complete the record before you start.

Mr. Swanson: That's right. I think that is proper.

Now with your Honor's indulgence——

The Court: Yes.

Mr. Swanson: ——I will read these citations and I will give you a copy. I have a copy for you.

The question before the Court in this instance is whether if businessmen regularly buy and sell a mineral [942] estate, even though it is entirely speculative as to whether any minerals exist, can it be said that where the right thus to barter and sell is taken away from it by the sovereign, that the owner of the mineral estate is not entitled to just compensation?

Now, even though it is entirely speculative whether there is anything out here, the mineral estate is taken away by the sovereign, is it for nothing, is this Court entitled to say, as a matter of law, "I give you nothing?"

The courts have held in such situations that evidence of the value of such an estate is competent in a condemnation proceeding.

In Securities and Exchange Commission against

Joiner, 133 Federal (2d), 241, which is not a condemnation suit, the court said:

"It is a matter of common knowledge that persons engaged in the oil industry in Texas and elsewhere buy, sell, assign and traffic in oil, gas and mineral leases and particularly those covering land near producing oil or gas wells or wells being drilled."

In *Montana Railway Company against Warren*, 137 U. S., 348, decided in 1890, the facts were that the [943] railway company brought a condemnation action to take for right of way purposes a mining claim in Silver Bow County, Montana, territory. On appeal the railway company contended that the trial court committed error in admitting evidence as to the value of the mining claim because there was no proof that any minerals existed in the claim. The Supreme Court held that such evidence was admissible, saying as follows, and this is the quote:

"There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not, therefore, the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that

[944] possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and, upon the trial, witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony; but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called 'only a prospect', had a value fairly denominated a market value, may, as the Supreme Court of Montana says, be affirmed from the fact that such 'prospects' are the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospects' has a market value; and [945] the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities."

Eagle Lake Improvement Company vs. United States, Fifth Circuit, 141 Federal (2d), 562. You don't need to write these down. This was a condemnation of a mineral leasehold estate for Navy

purposes in Texas. Mineral leasehold estate. Both the condemnation commissioners, and later a jury, held that the leasehold was valueless. Appellant's principal contention was that the charge of the court erroneously stated the law applicable to the issue of mineral value and was misleading, contradictory and prejudicial. In holding that this instruction was reversible error, the Court of Appeals said—this is the Fifth Circuit—I am now quoting:

“The instructions to which objection [946] was made in substance charged that the jury should find the mineral interests valueless unless from the evidence it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson vs. United States*, 292 U. S.,——”

not reading that part——

“Elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights [947] are a common subject of barter and sale, and therefore have a definite, as-

certainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable'. In any event, such leases have a nominal value. The mineral leaseholds here involved are immediately adjacent to a currently productive oil field. Whether or not that field is a domal structure the probable limits of which have been determined by exploration to reach to but not beyond the boundaries of the condemned lands, if the uncertainties are such that the mineral interests in the condemned lands are bought and sold in arms-length transactions for a valuable consideration, they have a market price translatable into a fair market value for condemnation purposes. The charge of the court did not correctly state the law applicable to the issue presented, and was prejudicial to the rights of appellants. The judgment is reversed [948] and the cause remanded."

In *Southern Pacific Railroad Company against San Francisco Savings Union*, 79 Pacific, 961, there was involved condemnation by the railroad for a right of way through a territory in California in which were known oil deposits. The question before the Supreme Court of California was as to the proper measure of value in such a case. Under the law of California the railroad would ordinarily acquire only an easement for right of way purposes. The railroad company therefore claimed that it had the right to show the mineral value which should be deducted from the full value since it would not get the mineral estate. The lower court held as a matter of law that in condemning a right of way over this

strip, which was part of a larger tract of oil-bearing land, there could be no difference in value between the easement and the fee and, over plaintiff's objections, permitted defendants to address their evidence solely to the value of the fee and instructed the jury that the defendants were entitled to have an award to that extent. The Supreme Court held that this was reversible error and that the railroad company was entitled to submit evidence as to the value of the mineral reservation, that is, in depreciation of what they must pay:

"If this reservation is of no benefit, [949] then, as a matter of course, the condemning party must pay for the easement whatever the value of the fee is ascertained to be. If, however, there is a beneficial ownership in the oils underlying the right of way, as these are reserved to the owner of the fee, the value of this beneficial ownership must be taken into consideration as something separate and apart from the value of the easement, and the value of the easement alone assessed against the condemning party. As in condemnation proceedings only an easement is acquired, this is all that the law requires shall be paid for. We discover no reason why the rule pertaining to the determination of the value of an easement, which is adopted with reference to mineral lands, where the minerals are in situ, should not be applied to easements over oil-bearing lands. In principle there is no distinction, though as to oil lands the practical application of the rule may be more difficult. It no doubt will always [950] be more difficult to prove whether a reserved right in

oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said to be impossible to do it."

Now that, your Honor, is the extent of our examination into the law, which we think could be helpful to you. I am giving the copy of my argument to counsel, too.

The Court: Yes, all right.

Mr. Hull: May it please the Court——

The Court: It is time for recess. If you prefer, I can take a 10 minute recess and give you a chance to look over Mr. Swanson's argument a few minutes.

Mr. Hull: Memorize it.

The Court: Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: All right, Mr. Hull.

Mr. Hull: If the Court please, counsel, if I may I would like to add one further ground for my objection.

The Court: All right.

Mr. Hull: And that is the evidence proffered is speculative and therefore inadmissible.

The Court: All right.

Mr. Hull: Specifically with reference to the three [951] documents offered, I would like to point out also that the option for lease to Regimbal would be of no value in this case as evidence for the reason that that document contains in it a condemnation clause, so-called, which terminates the rights of Mr. Regimbal both as to the option and the lease, as I read it, and furthermore that there is filed in this

case a disclaimer and a transfer back of any rights under that instrument by Regimbal to the grantor.

The Court: Is that disclaimer on file here?

Mr. Hull: It has been received and I believe filed.

Mr. Swanson: That is true, your Honor. I think it has been filed.

Mr. Hull: I believe it is in the case record.

The Court: All right.

Mr. Swanson: But that is not the condition of the title at the time of taking.

The Court: Yes, I understand, yes. It was separated at the time of taking, is your point.

Mr. Hull: There is a further ground which I may point out as to the documents proffered, and that is insofar as they have reference to the chain of title as to minerals or the ownership of them at the time of taking, that is not a question for the determination of the jury [952] in this case, any question of value only being for their determination under Rule 71(a).

I point out further that the proffered lease to the Shell Oil Company is terminable by its own terms at any time on notice.

As to the specific evidence proffered, that of Mr. Valentine, which apparently goes into the question only of probability in the minds of persons who might be considering the area as a possibility for exploration, the document of lease itself has been held in many cases, which I have already cited to the Court and which I now again refer to, as being no evidence of value, particularly where there has

been no discovery or development of commercial proportions anywhere in the vicinity; that any such evidence proffered would be entirely speculative in nature as to the possibilities of there being oil or gas here in a completely undeveloped and undiscovered area.

The reservations of mineral rights referred to in the offer of proof are, in themselves, no more evidence, or even less evidence, than these leases. It merely reflects an indication on the part of some owner that he would like to be there if anything happened.

The proffer as to there being active leasing in the area has no more weight than the lease referred to to the Shell Oil Company, where there is no foundation either [953] of discovery or development in the vicinity.

The offer as to the second witness, that people of ordinary business judgment are investing in mineral estates in other areas, I submit, has absolutely nothing to do with this case and it would be wholly immaterial and nothing more than of a speculative nature. Transactions in other areas, whether there is a discovery or not, would have to stand upon their own feet. They certainly would have no probative reference to this case.

Now, the cases cited by counsel, for instance, in this Securities and Exchange case in 133 Federal (2d), I think an inspection of that case, as the brief submitted by counsel indicates, shows it covers land near producing oil or gas wells, which is not the situation here even under any circumstances.

In the Montana railway company case vs. Warren, the Montana mining claim over which the right of way was taken, there we have a situation of a mining claim which was surrounded by proven value areas. As counsel said, it was right next door to the Anaconda properties, and the only question in that case was whether expert witnesses could testify as to what in their judgment was contained in this particular land under condemnation when the claim itself had not yet been worked. We have nothing comparable to this situation and that case is not [954] authority in any sense for the problem that we have here. They said in that case that, since the area was a recognized mining country, claims were being bought and sold and had a definite market value, then it was proper for the witnesses to testify as to their opinions as to this particular claim's value, although it had not yet been worked.

The Eagle Lake case cited by counsel is again based upon a different situation. We have an area where there had been commercial proven values, and furthermore the court refers as a foundation for its opinion to the fact that in Texas and under Texas law a mineral lease is recognized by law as being properly having a market value even if it covers undeveloped territory, and I submit that is not the law in this jurisdiction.

In the Southern Pacific case, again we have property involved which was in the vicinity of known oil deposits.

I am not, of course, going to cite again to the Court the long list of authorities that we have al-

ready submitted, but I do so refer to them for the record.

The Court: Do you have anything further, Mr. Swanson?

Mr. Swanson: No, your Honor.

The Court: This matter of mineral rights has [955] given me considerable trouble and counsel, too, I think, in these cases, particularly since there seems to be an increasing activity here in this area in the way of leases for prospecting for gas and oil, and I had it under consideration and did a lot of sweating over it in the case of Martinez, I believe it was, a year ago, and finally came to the conclusion, after admitting considerable testimony pro and con as to the geology of the subject land and the probability or possibility of striking gas and oil on it, I came to the conclusion that I should withdraw the whole matter from the consideration of the jury and I did so by appropriate instructions.

I appreciate counsel's duty to present this, since it is, as a practical matter, an element of value if you can lease these lands and get at least the first year's rental from it, but after examining counsel's cases and all that I can find and all that counsel have been able to find, I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for

gas and oil would be too speculative and remote to form the basis for compensation. [956]

And I think that will be my ruling here, that I will not submit this for the jury and will not submit to them the leases which have been received in evidence. They will be here for the purpose of showing the state of the title.

I might say that I don't think the fact that the minerals have been severed, as in some circumstances and for some purposes might have an important bearing, but here we have to keep in mind at all times that this is essentially an action in rem; **that the government is taking not a cattle business or not the cattle ranch of the owners Phillips and Haggerty, but is taking this specific land and is obligated to pay for it under the constitutional provision of just compensation on the basis of its highest and best uses, and, obviously, an owner could not increase the amount of compensation that should be received or the government's obligation to pay compensation by splitting title. You could do anything that you could conceive of. You might establish an estate for years with the remainder over and split it up into even splinter ownerships, and yet you wouldn't be entitled, as a matter of law, to one dollar more, because the just compensation would be the market value of the land at the time of taking, the market price of the land in the light of its highest and best uses.** [957]

There is this matter that occurs to me: I think it would be extremely dangerous in a case of this kind to submit to the jury the question of whether

or not there is substantial mineral value here and allow them to place an unknown value, a value which we wouldn't know they had placed, when their verdict came in. If they returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether \$10 or \$500,000 of that was based upon their idea of what these minerals might be worth, and if I should happen to be wrong, which it is my best judgment I would be, if I submitted it, the case would be upset in the Court of Appeals and it would come right back here a couple of years from now and we would start all over again to try this case again at that time. Of course, that is only a sideline observation because the basic responsibility of making these rulings rests on the trial court and that is where I recognize it is and that is where I accept it, and so the ruling is mine, I simply make this other observation as a sort of a sideline comment. [958]

* * * * *

The Court: Gentlemen of the jury, it is almost twelve and it is necessary to run late for lunch, but I think perhaps I should give you my instructions now and let you go to lunch afterwards, because I think it will save time in the long run. You will be ready then to get down to business here on your verdict as soon as you get back from lunch.

I wish it were possible for me just to talk to you a few minutes and let it go at that, but it is the duty of a trial judge in a case of this kind to fully and accurately instruct the jury on the principles

of law that apply and the rules of law that they are to follow in arriving at their verdict, the standards that they are to apply in arriving at the amount to be awarded to the owners, the way of testing the credibility of witnesses, and such as that, and I have to do that in legal language and fully and as accurately as I can. And, for the sake of completeness and accuracy, I have written out most of my instructions, as is usually done by judges. I may comment a little along the [1044] way on the matters I think should be helpful to you, but I try to bear in mind always it is the jury's job to finally determine the facts and my job, primarily, to determine what the law is and tell you about it, and to apply the law during the course of the trial, of course, I have to rule on questions of evidence and rule on law points as they come up. Then at the conclusion of the case, I instruct you on the law that applies, and so far as that instruction on the law is concerned, you are bound by my instructions. It is your duty to take them as correct and to follow them, regardless of what your own opinion might be as to what the law is or ought to be. If I depart from that and comment on the evidence, which a Federal judge has the right to do, you may consider that comment of mine on the facts and the evidence, but you are not bound by it, because it is your primary and sole duty and responsibility to find the facts, and I do not, as a rule, indulge in my privilege of commenting on the evidence to any extent. I think the jury should be left largely to the discharge of

their responsibility of finding the facts. I will comment only to the extent that I think it may be helpful to direct your attention to certain phases of the issues in the case.

Now, the government has brought these four condemnation cases against the defendant landowners and they have been, for convenience, consolidated for the [1045] purpose of trial. However, you are to regard them as separate cases. There is, as you remember, with the successive takings of the leaseholds or the right to use portions of this property, and then finally in 1954 the taking of all of the fee except for 3,000 acres which remains still in the ownership of the defendants.

Now, I think it might be helpful to you, I will refer to the numbers of these cases and give you just a brief description of them to begin with. Case No. 892 involves the taking of the fee title to the 33,213.13 acres of land. The date of taking was February 15, 1954. Now this matter of fee title that you hear so much about, that lawyers and judges talk about, it is a very simple thing. It simply means the entire ownership. When a fee is taken, the government takes all of the title and all the interest in the land that is capable of private ownership, the whole thing. The other three cases which have been referred to in the testimony throughout the trial are the leasehold cases involving the taking by the government of leaseholds; that is to say, the right to exclusive use of the property. Now, such a taking, I may say, is not altogether analogous, but I think a comparison

might be helpful. It places the government in a situation generally similar to that of a tenant and the owner to the position of a landlord or lessor. The three leasehold actions are No. 452, involving the taking [1046] of a leasehold interest in 4,086.69 acres of land on February 10, 1950; Case No. 488, involving the taking of a leasehold interest in 3,034.84 acres on July 5, 1950, and Case No. 762, involving the taking of a leasehold interest in 6,869.22 acres of land on October 28, 1952.

Now, as I will explain more in detail later on, separate verdict forms will be submitted to you in each of these four cases, the one fee case and the three leasehold cases, and you will be asked to return separate verdicts as to each case.

Now, the plaintiff United States—I might say here that these terms may be not so familiar to you, although you gentlemen, I think, have had experience in jury cases before—but plaintiff simply means the government in this case, the defendants means the landowners. The plaintiff United States brought each of these cases against the defendant landowners to acquire the property for public use in connection with what is commonly known as the Yakima Artillery Range project. For the purpose of this case, you are to assume that the taking by the government was authorized and you are not to concern yourselves with the wisdom of the taking and, I might say, with the manner of the taking. You are simply to find the compensation in accordance with the evidence and my instructions here. The government has what is known as the power

of eminent domain, [1047] which means in simple language that it has the right to take private property for public use. In the exercise of that power, it prosecutes a condemnation action in which it acquires the property. The Federal Constitution provides, however, that the government must pay to the owner just compensation for the property taken.

Now, for convenience in these instructions, I shall refer to Case No. 892, involving the taking of the fee ownership, as the fee ownership case, and I shall refer to the other three cases as the leasehold cases.

This term "just compensation" means the full and fair equivalent in money of the property taken. As to the fee ownership case, it is the fair cash market value of the property as of the date of taking and severance damage to the remaining property of the defendants not taken; that is, the 3,000 acres, just in round numbers, that was left. As to the leasehold cases, "just compensation" means the fair cash rental value of the interest acquired by the government in and to the property taken as of the date of the taking, and severance damages to the remainder of the property not taken. I have already stated the date of taking in each of the four cases.

Now, "fair market value" is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the property in the [1048] open market for cash. It is the amount which in all reasonable probability would have been arrived at by fair negotiations be-

tween an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to purchase. In arriving at the fair market value, you will take into account all of the considerations that would fairly be brought forward and reasonably given weight by well informed men bargaining to fix the price.

In your determination of the market value, you may take into consideration not only the present and past uses or capabilities of the land, but also any use to which ~~it~~ it could have been put in the reasonably near future. In other words, you may take into consideration the highest and best potential uses to which the land may be put. An owner is entitled to compensation on the basis of the highest and best use to which the land can be put, regardless of the fact that it has never actually been put to that use in the past.

Now, I think it might make it clearer to simply say that in these cases the action is against the land, not against any particular individual. The government is taking here this land with all of its improvements and with all of its values for its highest and best uses, but it is not condemning a cattle business of any particular person. It is simply taking this land, and what you are to determine is [1049] the cash market value of the land as of the date of taking, what would it have brought in a free and open sale on the open market for cash at the time the government took it. That is the gist of this instruction that I have just given you.

Now, there has been some mention made of min-

eral rights here. I think I should tell you that that question has been carefully considered by the Court and the Court has come to the conclusion as a matter of law, and you are instructed, that there has been shown no substantial value here for mineral rights and you are not to award any value for mineral rights. You are to utterly disregard any evidence that may have come in or any mention of that matter.

Now, you should not consider any unwillingness of the owner to sell the property or have it condemned. The question is not what the property would have been worth to the owner had he retained it because it may possess a greater value to him than it has in the open market. For the same reason, you should not consider the value of the property to the government in determining its market value. The fact that the government needs the property in no way serves to increase its market value, and consideration of that circumstance has no place in your deliberations.

Evidence regarding the sale of other properties has been offered by some of the expert witnesses in giving [1050] you a basis for their opinions as to the market value of the lands with which we are here concerned. You should give consideration to such testimony because, generally speaking, sales of similar property on or about February 15, 1954, the date of taking, furnish the most desirable basis of fixing market value. However, it is for you to determine what sales to which the witnesses testified cover land substantially similar to the land involved

here, and the nearness or remoteness in time and distance of such sales from the time of taking and the location of the defendants' lands and any and all other points of similarity or difference in comparison with defendants' lands should be considered by you in deciding what weight you are to give to such testimony as to the sales of other lands.

Evidence of what the owners paid for this subject property which is under consideration here was introduced and allowed to go to you for that same reason, for your consideration as a comparable sale. It is not binding one way or the other in a case of this kind. If an owner has been able to get a good bargain, he is entitled to the benefit of that bargain. If he has paid too much for the property, the government is not prejudiced by that or not required to pay it and, of course, you should take into consideration any change in value that may be shown by the evidence which you find from the time of the sale to the [1051] owner, or the purchase by the owner, to the date of taking by the government.

Now, in determining the compensation to be allowed the owners of this property for the taking of the fee simple title thereto by the government, you will fix that compensation as of the date of taking, February 15th, 1954, and you will give no consideration to the fact, if it be a fact, that such land has increased in value since the date of taking or to the fact, if it be a fact, that the particular tract has depreciated in value since the date of taking. Compensation to be determined by this jury should

be paid by the government for the taking of these lands is the sum that you would have determined should have been paid had you been trying this case on the 15th day of February, 1954.

Just compensation does not include speculative elements. While property is to be valued with reference to all the uses to which it is adapted, your consideration of possible future uses of the property should not take in future uses which, upon the evidence, you find to be remote, speculative, or uncertain, and in determining just compensation you should not take into consideration any improvement to the premises made by the Army after February 15, 1954, the date of taking.

In determining just compensation to be paid for [1052] the fee simple taking of this land, you are instructed to consider all relevant physical facts for the purpose of arriving at a final figure which in your opinion, based upon all the evidence, will be just compensation for all of the lands which are the subject matter of this litigation. That is to say, this is not to be viewed as separate takings of the range land, cultivated land, potential crop land and improvements, but is to be viewed as the taking of a single piece of property, and your verdict should reflect one figure as the fair cash market value of the property as a whole. In other words, it is your duty to consider all proper facts and circumstances that contribute to make the property valuable, all that detract from it, and finally, weighing all those elements, to determine what is just

compensation for the property that has been taken by the government.

Now, with reference to the leasehold cases, when land is taken for a temporary use, the measure of compensation to be awarded for the use and occupation by the government of the property of the defendants is not the market value of the property, but is the fair cash rental value of the interest acquired by the government in and to the property. The fair rental value is that sum of money which, considering all the circumstances disclosed by the evidence, could have been obtained for the use and occupation of the [1053] lands in question by an informed owner, willing but not compelled to lease, offering to rent them in the open market for cash to an informed tenant, willing but not compelled to rent. In determining the fair rental value, you should not consider the rental value of the property to the government. The fact that the government needs or can use the property in no way serves to increase its fair rental value herein.

In awarding compensation for the use of the land being condemned, you should bear in mind that you are concerned with the reasonable market rental value of the tracts as of the date they were respectively taken, and not any remote, speculative future rental value that the lands might thereafter have.

Now, severance damage, as used in these instructions means simply that when a tract of land which has been used or is capable of being used as a unit for farming and stock raising is severed and part

of it is taken by the government for public use, the owner is entitled to be compensated for any damage that may have been suffered by the portion of the tract left to him by reason of part of it having been taken away. Severance damage in any case is the sum of money by which the market value in the fee case and the rental value in the leasehold cases of the remaining property has been diminished or reduced by reason of its being separated or severed from [1054] that portion of the tract taken for public use.

Fair market value, fair annual rental value and severance damages, if any, as elsewhere defined in these instructions, are not to be determined with reference to the defendants' increased cost of doing business, if any, nor by any inconvenience which may have been caused to them, nor by any loss which they may have sustained or may in the future sustain by reason of reducing the size of their operations.

You are instructed that this action involves only lands owned by defendants themselves. There has been some evidence that the defendants have under lease lands owned by others. The purpose of such evidence was to show availability of these lands for use in connection with the subject property and should not be considered by you for any other purpose. Therefore, no compensation shall be allowed to the defendants with respect to any lands owned by other persons or corporations or by the United States, state, or county but which may have been

leased to the defendants or used or occupied by them in conjunction with their own holdings.

As I have stated, the measure of compensation to be allowed to the defendants in this action is the fair market value and fair rental value, respectively, of the property and severance damages, as elsewhere defined in [1055] these instructions. Past profits or probable future profits that might have been realized from ranching, farming, or other operations conducted upon the land are too speculative and conjectural to furnish any basis for determination of value. You are not permitted to consider such profits in determining the amount of the award which the defendants should receive.

Now, you are the sole judges of what is the evidence in this case, as I have said, and of the credibility and weight to be given to the different witnesses. In weighing the testimony of witnesses, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of true testimony. Those factors are suggested by these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Did he appear to be fair and candid or otherwise? Was the testimony reasonable and consistent within itself and with uncontradicted facts?

In judging the credibility of the witnesses in this case, you may believe or you may disbelieve the whole or any part of the testimony of any witness as may be [1056] dictated to you by your judgment as reasonable men. You should carefully scrutinize the testimony given and, in so doing, consider all the circumstances under which the witness testified, including his relation, if any, to the plaintiff or to the defendant, the interest he may have in the case, the manner in which he may be affected by the verdict, and the extent to which he is contradicted or corroborated by other witnesses or other evidence, and every matter that tends reasonably to shed light upon his credibility.

Now, an expert is an individual who, by education, study, training, experience, or observation has acquired special knowledge, skill, or understanding in a particular field beyond that of the average person. Where the witnesses qualify as experts in a particular field and are allowed to express opinions, rather than to testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invading its function. The responsibility to decide rests upon the jury. It is your duty to evaluate and appraise the testimony of a witness who expresses opinion precisely as you would evaluate and appraise the testimony of witnesses who testify to facts within their personal knowledge. The rules for determining the credibility of witnesses which I have given to you in these instructions apply to expert witnesses, as well as [1057] to other witnesses. Now that, gen-

lemen of the jury, is a particularly important function in this case because the values which have been given here, market values, opinions of market value and opinions of rental value, given by these experts, and it may seem strange to you, as it has to me, the very wide spread that there is between these expert witnesses, who have the appearance of being honest witnesses and witnesses of common integrity. The wide spread has been commented on in argument and, of course, you have it in mind. I think here, for example, according to my figures, and these are only mine now—your own recollection of what the testimony and the evidence is is to govern if it differs from mine—that as to the fee taking, Mr. Conner placed a value of \$425,000.00, Mr. Haney, for example, for the defendant, \$1,461,000.00 on the fee, and there were not quite so great, but very great differences, too, to the leasehold values. Now, it is for you to place the weight and credit on these different witnesses and arrive at the figure that you think is right and just, and I will not try to invade your functions.

I might point out one or two things that might be of some help to you in this particular, one thing on which the witnesses differed greatly, and it has to do with the value of the range lands, with the carrying capacity. I think the government witnesses testified from 800 to 1,000 [1058] the landowners around 2,000 head, that it would carry. Now, that is a thing which had quite an influence on the spread in the values of the range land, one big difference, and I think perhaps the biggest difference,

is due, it seems to me, to the question of how much potential wheat land there is, how much potential crop land there is, up there. Remember, there isn't a great deal of difference, as you recall, as to what has already been put under cultivation and cropped in the past, around 900 acres, something like that, but Mr. Conner testified, for instance, that there was only, in his judgment, 700 acres of desirable land that hasn't been broken out yet. Based, in considerable part, upon Mr. Smith's testimony, the defendants' witnesses thought that there was about 7,400 acres of potential crop land there, and I think that around \$700,000.00 or \$800,000.00 was based upon that potential wheat land value. Now, that is a very important point for you to determine, what in your best judgment from the evidence was the amount of potential crop land over and above what has already been broken out.

Another thing, of course, was the difference in the experts as to what was comparable sales and what was comparable property. The defendants' witnesses took Adams County wheat land. The government witnesses say that is not comparable, it shouldn't be compared with this. Now, that made a great deal of difference, so that those [1059] factors, I think, were the ones that were largely responsible for the wide spread in the testimony here of the value experts, and that difference, as I have said, is for you to resolve. I will not express any opinion about it.

Now, in this case, the defendant land owners have testified as to what in their opinion was the market

value and the rental value of the property taken. You will give consideration to such testimony, since, under the law, an owner is qualified and permitted to express an opinion as to the value of his own property when it is taken for public use. You will understand, however, that you are not bound by such an opinion any more than you are bound by the opinion of any other expert witness, and you have a right to take into consideration the interest the defendants may have in the amount of your verdict.

At the opening of the trial, you were taken to view the property involved here. This was done in order that you might better understand the testimony to be given and also to aid you in coming to the correct conclusion as to the just compensation to be awarded to the owners. That which you observed on the view of the property, you should remember as a part of the evidence in the case, having in mind any changes shown by the evidence to have taken place in the property since it was taken by the government. The statements of the witnesses who have testified must be [1060] considered by you, but you are not bound by them if your examination of the property leads you to a different conclusion. That which you saw and that which you have heard from the witnesses should both be duly weighed and considered.

Now, from time to time the attorneys for one or the other parties has interposed objections to evidence. Counsel not only have the right but the duty to make any and all objections which are

deemed advisable and appropriate and no inference or presumption should be indulged in one way or the other because an attorney on either side has made objections. And from time to time I have been called upon to pass on a question of whether certain offered evidence should be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offered evidence that was rejected, you should not consider the same. As to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason for the objection.

Now, if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or defendants in this case, [1061] you should not be influenced by that suggestion. I have tried to be strictly impartial and if any action or expression of mine has seemed to indicate the contrary, you are instructed to entirely disregard it. If I have made comment on the evidence regarding the facts in this case, and that applies both to my instructions and otherwise, in the course of the trial, you may consider it, as I have said, but you are not bound by that comment. It is your duty to follow my instructions as to the law, but finding the facts is your sole function and responsibility.

You should not consider as evidence any statement of counsel made during the trial unless the

statement was an admission or a stipulation conceding the existence of a fact or facts.

In arriving at your verdict, it is proper for you to give due consideration to each other's views in your discussion of the issues in the jury room, but you are not permitted to add together different amounts representing the views of individual jurors and then divide the total by twelve or by the number of views represented. The result would be what we call a quotient verdict, which is contrary to law and is not a good verdict.

It is your duty to make every effort to agree, but such common agreement should be based upon the final, honest belief of the jurors and must not be arrived at by [1062] any mechanical process of addition and division, which constitutes a quotient verdict. It would likewise be improper for you to add together the amounts testified by various witnesses to be the market value of the property and then divide the total by the number of witnesses. That wouldn't be a proper method, either.

Now, in your deliberations, it goes without saying, I think, that there is no room for sympathy, sentiment, prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, and to decide the issues strictly upon the merits.

Now, when you retire to the jury room to consider your verdict, you will take with you the exhibits which have been admitted in evidence for your consideration in the case and a summary or a

written statement of the testimony of the witnesses, the expert witnesses, as to values on the market value and the rental value of the lands and blank forms of verdict which have been prepared for your convenience.

Now these statements of values, there is one for each of the cases so it will be easier for you to keep from getting these various cases confused. It is difficult and complex, I recognize, but you will find a number on each of the forms of verdict. For instance, in the first one, the fee case, that is 892, No. 892, and that reads, "We, the jury [1063] in the above-entitled cause, find just compensation for the taking of the defendants' property," and then in parentheses—this is to aid you in identifying this—"fee ownership of 32,213.13 acres", including severance damages to the remainder of the defendants' ownership, to be dollar sign blank. When you have agreed, you write in the amount and the foreman signs it. The other three are leaseholds, and they give the numbers, 452, 488, 762, there is one for each case, and in there we have indicated that they are leaseholds. I will just read one of them because they are alike in every respect except the number and the acreage: "We, the jury in the above-entitled cause"—this is No. 452—"We, the jury in the above-entitled cause, find the value of the annual rental and severance damage for the leasehold taken (4,086.68 acres) to be \$———."

Now, I might say it has been agreed between the parties and the Court here that, to save you the considerable difficulty and inconvenience of making

calculations as to what the total rental should be in each case, we have arranged these verdicts so that you will find only the annual rental and severance, what was it worth each year, and then after you have returned your verdict, why, at our leisure, the attorneys and I can take a pencil and figure up what the total would be, because the landowner will get rental at this rate you fix for the entire time the government [1064] had it before they took the fee. I don't know whether I make myself clear on that or not. But, here, the government took this 452 in January of '50, I believe it was, January of '50, January or February. Well, say early in 1950 they took this land in 452. Now, all we are asking you to do is a find the annual, by the year, compensation that should be paid to the owner, how much he should get for one year's rental and severance damage. When you have found that, then the attorneys and I later in arriving at the judgment will compute how much that would be for the entire period from February, 1950 until February, 1954, when the property was finally taken in fee by the government. But to make it easier for you, you find only the annual rental and we will figure the rest out afterwards. And these others are the same except for, as I said, the numbers and the acreages.

Now, what the witnesses testified to here, the two government expert witnesses and three defendants' witnesses, we have put their figures down so that you will have them on each of the cases with the number corresponding to the verdict number, and if you want to see what the testimony was in the

fee case, we'll say, 892, look for No. 892 and here it is on this statement. If you want to see what it was on 452, look in this statement, 452, you will find it here on each one of the cases. [1065]

Now, the first thing you should do when you retire is to elect one of your number as foreman and he will be your chairman and preside over your deliberations and then sign the verdicts when you have agreed upon them, and in this case ten of your number may return a verdict. I want you to bear that in mind, because, unless there is some agreement between the attorneys, the whole jury must agree, it must be unanimous, but they have agreed in this case that any ten of you, when you agree, can return a verdict, and when ten of you have agreed, you have to agree on each one of them, of course, ten have to agree on each of the verdicts because they have to be considered separately, and when you have agreed upon these verdicts, why, have the foreman sign them and let the bailiff know that you are ready and then you will be brought back into court to return the verdicts in open court.

Now, I will ask you to step out just a moment. We will have some short proceedings in your absence.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: You gentlemen have had copies of these forms of verdict, have you not?

Mr. Swanson: Yes, your Honor.

The Court: All right, in the absence of the jury,

counsel may take exceptions to the instructions to the jury. [1066]

Mr. Hull: We have none.

Mr. Swanson: I except to the instruction regarding mineral rights, regarding withholding from the jury of any valuation, regarding taking from the jury of the right to find a value to the mineral rights.

That is my only exception, your Honor.

The Court: All right. Well, you may call in the jury if there is nothing else that you think of here that I have overlooked. Well, we will swear the bailiffs after they get back in. [1067]

* * * * *

[Endorsed]: No. 15156. United States Court of Appeals for the Ninth Circuit. R. H. Phillips and Jessie E. Phillips, his wife, R. R. Haggerty and Winnie Haggerty, his wife, and D. Everett Phillips and Evelyn Phillips, his wife, individually and in behalf of the Cold Creek Company, a partnership, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Eastern District of Washington, Southern Division.

Filed: June 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15156

R. H. PHILLIPS, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

The appellants do hereby make the following concise statement of points upon which the appellants intend to rely on the appeal:

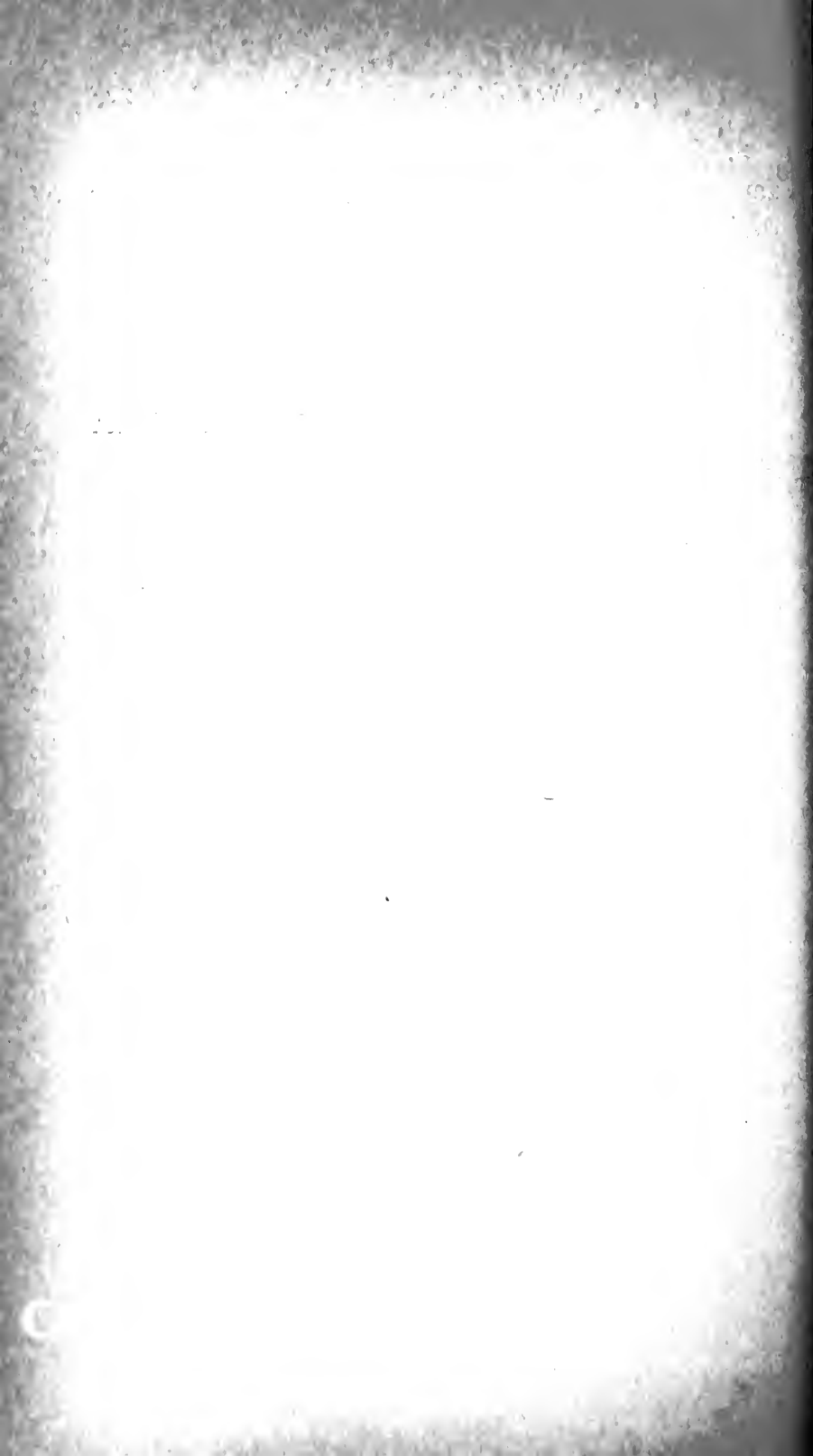
1. Rejection of exhibits for identification No. 96 and 97 which are leases to oil companies for mineral exploration for consideration expressed therein, offered as proof of highest and best use of land not inconsistent with agricultural use.

2. Rejection of proffer of proof of rental payments, of the situation of condemned property within the active leasing area of six major oil companies, contractual interest in the geology of the subject property by major oil companies, and offer to prove probability and possibility of oil or gas development and consequent cash market value of owner's mineral rights through competent witnesses (in addition to rental income).

3. Requirement by the trial court that the defendants conduct their case in accordance with the desires of the trial court as to order and manner of proof.

/s/ WALTER V. SWANSON,
Attorney for Appellants.

[Endorsed]: Filed June 16, 1956. Paul P. O'Brien, Clerk.



IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

R. H. PHILLIPS and JESSIE E. PHILLIPS,
his wife, R. R. HAGGERTY and WINNIE
HAGGERTY, his wife, and D. EVERETT
PHILLIPS and EVELYN PHILLIPS, his
wife, individually and in behalf of the
Cold Creek Company, a partnership.

Appellants,

No. 15156

vs.

UNITED STATES OF AMERICA,

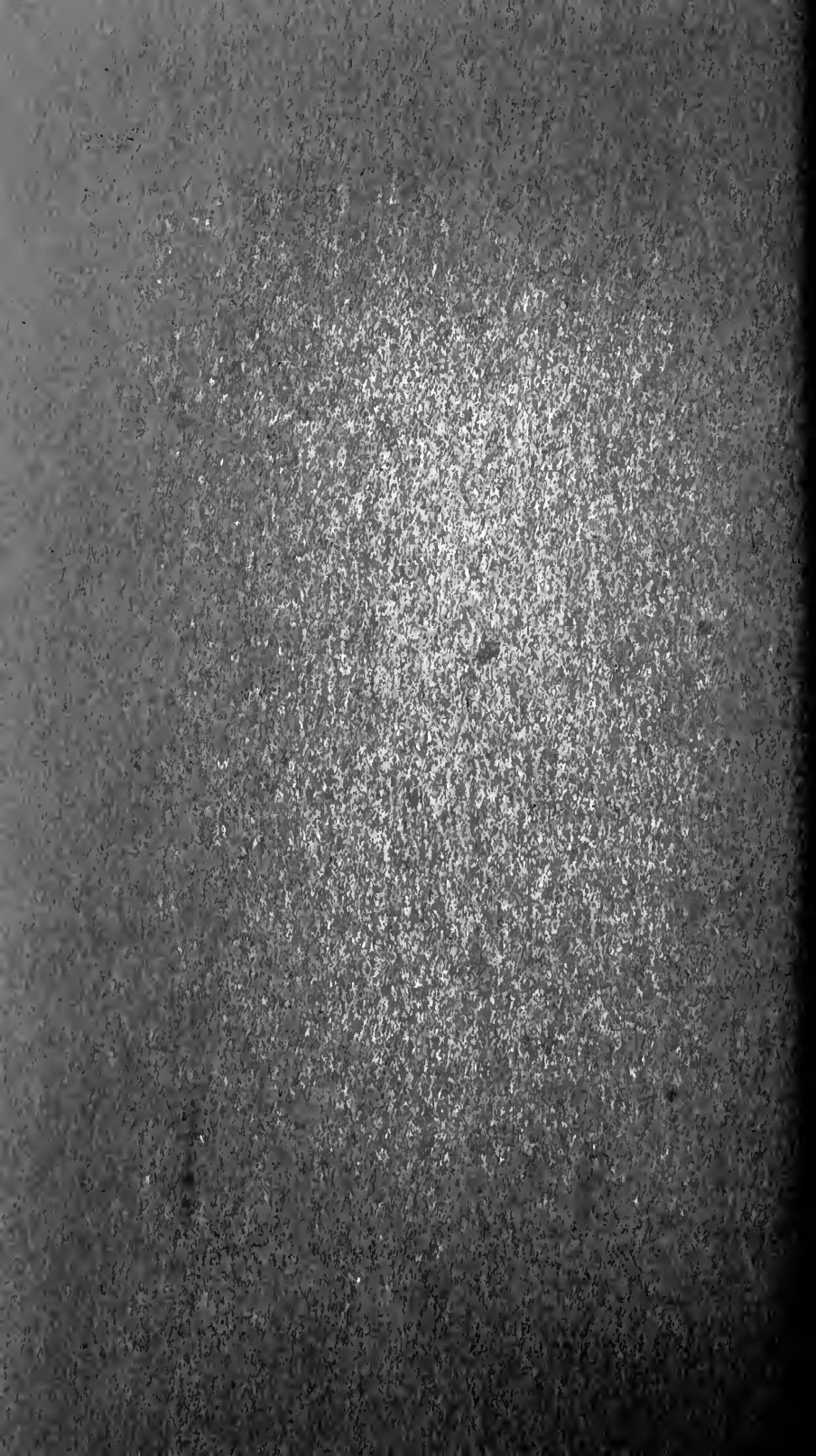
Appellee.

BRIEF FOR APPELLANTS

WALTER V. SWANSON
DOUGLAS A. WILSON
Attorneys for Appellants

FILED

OCT 15 1956



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NO. 15156
IN THE
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

<p>R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife, R. R. HAGGERTY and WINNIE HAGGERTY, his wife, and D. EVERETT PHILLIPS and EVELYN PHILLIPS, his wife, individually and in behalf of the Cold Creek Company, a partnership, <i>Appellants,</i></p> <p style="text-align:center"><i>vs.</i></p> <p>UNITED STATES OF AMERICA, <i>Appellee.</i></p>	}	No. 15156
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BRIEF FOR APPELLANTS

The appeal is by the defendants from judgments on the verdict in the Consolidated Cases, Civil No. 892, 488, 452, and 762, awarding the defendants compensation in an action for condemnation. The defendants have appealed because the Court rejected introduction of evidence as to the value of minerals, mineral rights, and mineral leaseholds after proffers were made, and as a result thereby the compensation awarded was inadequate and unjust.

STATEMENT OF JURISDICTION

The action was by the United States to condemn lands in Yakima County, Washington, pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Acts of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress

approved August 1, 1888 (26 Stat. 357; 40 U. S. C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U. S. C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes and the Act of Congress approved October 29, 1949 (Public Law 434—81st Congress), which Act appropriated funds for such purposes.

The judgments appealed from were entered November 30, 1955. R. 50-74. Defendants' motion for a new trial was denied January 6, 1956. R. 78-79. Notices of appeal were filed March 2, 1956. R. 79-82. This Court has jurisdiction upon appeal to review the judgment under Section 128 of the Judicial Code, as amended, 28 U.S.C.A., Sec. 255 (a).

STATEMENT OF THE CASE

The complaints in condemnation were filed December 17, 1952, to condemn certain leasehold interests (Civil Action Nos. 762, 452, and 488) and on February 15, 1954, as to certain fee simple title (Civil Action No. 892) to lands in Yakima County, Washington, for the purpose of adequately providing for an artillery range and for a training and maneuver area for troops in connection with the Yakima Artillery and Anti-Aircraft Firing Range. Civil Action No. 892, in which fee simple title was held by the appellants, involved a taking of approximately 33,213.13

acres. The mineral rights on 26,000 acres of said lands had been severed and dealt with by the appellants prior to the time of taking, and were owned by the Cold Creek Company, a partnership, comprising the appellants and Walter V. Swanson and Marjorie T. Swanson, defendants. Ex. 120, R. 233-234.

The sole question involved is the Trial Court's refusal to permit testimony and evidence to be submitted for the purpose of establishing a value to minerals, mineral rights, and mineral leaseholds in connection with said 26,000 acres.

The area involved in the taking had a record of being gas bearing, gas having been produced commercially for a period of approximately eleven years. R. 135. There is no record of commercial production of oil. In the years prior to the taking, and subsequent thereto, there was considerable activity in the leasing of land for mineral purposes by major oil companies. At the time of taking, the appellants had leased a substantial block of land to Shell Oil Company (rejected Ex. 97) for mineral exploration and development, and also had an option for mineral leases on the remainder of said lands to Laurent Regimbal, as agent for oil and gas concerns. (Rejected Ex. 96). All of the major oil companies were actively leasing in the area. R. 40-41, 236-242.

During the pendency of the action, on May 6, 1955, the appellants filed a petition for dismissal of mineral

rights from condemnation proceedings, R. 40-42, and on the 24th day of June, 1955, an order denying petition for dismissal of mineral rights from condemnation proceeding was entered. R. 42-43.

The Northern Pacific Railway Company, a defendant in Civil Case No. 892, having reserved mineral rights to the balance of the lands held by appellants Phillips and Haggerty, was dismissed from the trial, and the determination as to approximately 5620 acres of mineral rights was postponed until some future time by order of the Court dated October 24, 1955. R. 69-70, (Judgment on Verdict), R. 129, 130.

In the trial of the consolidated cases, the Trial Court indicated immediately that he was "quite disturbed . . . about this mineral rights situation." R. 88. He endorsed the position of government counsel that "unless the land is a proved field or reasonably adjacent to a proved field, which isn't the situation here, that mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist there. And, having been through these cases before, *I don't think it is possible to show reasonable probability* of gas and oil values under these lands." R. 89. (Italics mine).

The Trial Court further stated, "I can't see how as a practical matter you could prove how much the possibility of leasing for exploration would enhance the

market value of this land unless you could show how much is paid by oil companies for leases, and then you get back to the proposition of putting in these leases and the amount that the owner would get for exploration leases, which I think is clearly improper because it is too speculative." R. 89.

The record shows that counsel for appellants sought by stipulation with the government to separate mineral values from the remaining value, the Court having conceded that "the exploitation of mineral value would not be inconsistent with agricultural value," R. 92, but no stipulation was entered into between the parties.

Thereafter, counsel for appellants made repeated proffers of exhibits and testimony in connection with establishing a value incident to mineral rights as a result of the lands being a part of an active leasing area. R. 134, 135. Appellants sought to introduce the testimony of a geologist from Shell Oil Company to testify as to the presence of factors in the area necessary for exploration of gas and data as to existing leases in the field, R. 170, and the testimony of a lease agent from Carter Oil Company, a subsidiary of Standard Oil Company, to testify as to dealings in mineral leases and rights in the area, including his own activities. R. 170.

A proffer was made as to the existence of and development of gas in the area. R. 173, 174.

Exhibit No. 97, a lease on mineral rights from the

appellants to the Shell Oil Company, prior to taking, and Exhibit 96, an option to lease from appellants to Laurent Regimbal, were proffered, R. 207-210, and the Court at that time reserved ruling, R. 210-212, stating, however, that "I take the position that the existence of these prospecting leases becomes material only in the event it is shown that there are mineral right values or minerals of substantial value in the property, and that if there isn't anything shown on which there could be compensation for minerals, the fact that there are mineral leases is immaterial."

Exhibit 120, the deed of mineral rights from the defendants individually to the Cold Creek Company, comprising the appellants and the Swansons, defendants, Exhibit 96 and Exhibit 97, were later in the course of the trial admitted by the Trial Court for the sole purpose of consideration by the Court as to the state of the title, the Court again reserving ruling as to whether said exhibits should be submitted to the jury. R. 233-235.

Counsel for the appellants prior to closing appellants' case then made a formal offer of proof encompassing all that had gone before and developing further the evidence, both as to oral testimony and written exhibits, sought to be introduced. R. 236-242. Said offer of proof outlined the evidence appellants believed would establish a definite basis for ascertainment of mineral values by the Court and jury, and included the following facts:

1. The basic factors which govern the decision by major oil companies of whether to invest in leaseholds and to explore for oil.

2. The presence and existence of a sufficient number of said factors in the subject land.

3. The probability of oil or gas in the area, based on geological surveys.

4. That the area in question constituted an active leasing area of common knowledge among oil people and owners of real estate.

5. That Shell Oil Company, Ohio Oil Company, Texas Oil Company, Richfield Oil Company, and Standard Oil Company are and have been leasing mineral rights in said area.

6. That recent sales of lands in the area have all involved a reservation of mineral rights.

7. That the leasehold interest in mineral leases, the landowners' mineral estate, and the option to lease for mineral rights all have a definite ascertainable value.

8. That companies make a business of investing in a percentage of the mineral estate remaining in the landowner after a lease of the mineral rights to a major oil company.

The Court then rejected Exhibit 96, the option to lease from appellants to Regimbal, and Exhibit 97, the

mineral lease from appellants to Shell Oil Company, and Exhibit 120, the Cold Creek Company lease, indicating that said exhibits were not proper evidence to determine value at time of taking. R. 252, 253. Testimony by the Shell geologist, Mr. Valentine, and the Carter Oil land man, Mr. Beam, together with all the other elements of proof set forth above, were rejected, the Court holding that such evidence proffered "would be entirely speculative in nature as to the possibilities of there being oil or gas here in *a completely undeveloped and undiscovered area.*" (Italics mine). R. 250. The Court emphasized that there must be "discovery or development of commercial proportions . . . in the vicinity." R. 250. The Court's ruling in part is as follows:

"I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.

"And I think that will be my ruling here, that I will not submit this for the jury and will not submit to them the leases which have been received in evidence. They will be here for the purpose of showing the state of the title." R. 252-253.

The Court further stated in conclusion:

"There is this matter that occurs to me: I think it would be extremely dangerous in a case of this kind to submit to the jury the question of whether or not

there is substantial mineral value here and allow them to place an unknown value, a value which we wouldn't know they had placed, when their verdict came in. If they returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether \$10 or \$500,000 of that was based upon their idea of what these minerals might be worth, and if I should happen to be wrong, which it is my best judgment I would be, if I submitted it, the case would be upset in the Court of Appeals and it would come right back here a couple of years from now and we would start all over again to try this case again at that time. Of course, that is only a sideline observation because the basic responsibility of making these rulings rests on the trial court and that is where I recognize it is and that is where I accept it, and so the ruling is mine, I simply make this other observation as a sort of a sideline comment." R. 253-254.

The Trial Court, having rejected all proffered testimony and evidence concerning a determination of value as to mineral rights, instructed the jury as follows:

"Now, there has been some mention made of mineral rights here. I think I should tell you that that question has been carefully considered by the Court and the Court has come to the conclusion as a matter of law, and you are instructed, that there has been shown no substantial value here for mineral rights and you are not to award any value for mineral rights. You are to utterly disregard any evidence that may have come in or any mention of that matter." R. 259, 260.

The basic question on the appeal is whether all the proffered evidence as to mineral values, existing mineral leases, and the buying and selling of mineral estates was properly excluded by the Court. In making its ruling concerning the inadmissibility and rejection of said evidence,

the Trial Court admitted that, "There seems to be an increasing activity here in this area in the way of leases for prospecting of gas and oil." R. 252.

By reason of the exclusion of evidence as to said values, and the fact that the jury had no opportunity to translate the loss of these valuable rights and property interests into the equivalent in money, the appellants therefore were deprived of "just compensation," the verdict as to Civil Case No. 892 being inadequate as a matter of law.

Although the diminution of the verdict was directly related only to Civil Case No. 892, the refusal of the Trial Court to admit the evidence as to mineral values, the partisan attitude of the Trial Judge in dealing with this problem and in excluding the evidence, inured in the verdict as to all four consolidated cases. The inevitable result was that appellants were denied a fair and impartial trial and the right safeguarded by the Fifth Amendment that private property shall not be taken for public use without just compensation.

SPECIFICATION OF ERRORS

1. Rejection of Defendants' Exhibit 96—an option to lease mineral rights from appellants and defendants Swanson to Laurent Regimbal, and Exhibit 97—a mineral lease from appellants and defendants Swanson to Shell Oil Company, at 25c per acre, both of said exhibits being

executed prior to the taking for valuable consideration, and both dealing with subject lands. R. 234-241.

Evidence offered to show proof of the following facts:

- a. Value of appellants' mineral estate, through rental payments and possibiltiy of oil or gas production.
- b. Highest and best uses of land not inconsistent with agricultural use.

Evidence rejected by the Court for the reason that "allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

2. Rejection of proffers of testimony of Mr. Valentine of the Shell Oil Company, and Mr. Beam of Carter Oil Company, a subsidiary of Standard Oil Company, said testimony to establish sub-surface geology of area, and to establish a contractual interest in the geology of the subject property by major oil companies, to prove probability or possibility of oil or gas development and production, to establish that condemned lands were within an active leasing area, to set forth all transactions in the area as to purchase and sale of leasehold interests and mineral estates. R. 170, 236-242.

Evidence offered as proof of:

- a. Real and ascertainable value of mineral leaseholds, and mineral estates.

- b. Active barter in mineral leaseholds and mineral estates.
- c. Possibility of oil or gas production.

Evidence rejected by the Court for the reason that "allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

3. Requirement by the Trial Court that the appellants conduct their case in accordance with the desires of the Court as to order and manner of proof, thereby denying appellants a fair trial and due process of law.

ARGUMENT

1. Appellants Denied Just Compensation by Erroneous Exclusion of Evidence.

The discussion on the first two errors relied upon, concerning exclusion of evidence, can be considered together. The basic error relating to said exclusion of evidence is that as a result the appellants were deprived of "just compensation" as a matter of law.

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been

taken. *U. S. v. Miller*, 317 U. S. 369, 373; 63 S. Ct. 276, 279; 87 L. Ed. 336.

In *Olson v. U. S.*, 292 U. S. 246, 255, 54 S. Ct. 704, 708, the Supreme Court stated as follows:

“In respect to each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it, that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, 124; 44 S. Ct. 471; 68 L. Ed. 934, 941.”

The Supreme Court has further held that the ascertainment of value is not controlled by rigid rules or artificial formula. What is required is “a reasonable judgment having its basis in a proper consideration of all relevant facts.” *Minnesota Rate Cases*, 230, U. S. 352, 434, 33 S. Ct. 729, 57 L. Ed. 1511. *Standard Oil Company of New Jersey v. Southern Pacific Company*, 268 U. S. 146, 156, 45 S. Ct. 465, 69 L. Ed. 890.

In *U. S. v. General Motors Corp.*, 323 U. S. 373, 378, 65 S. Ct. 357, 359, 89 L. Ed. 311, the Supreme Court declared:

“Property . . . denotes the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . The constitutional provision is addressed to every sort of interest the citizen may possess.”

The evidence which counsel for appellants attempted to introduce, including the Shell Oil Company mineral lease, Exhibit 97, and the Regimbal mineral option, Exhibit 96, would have established that the appellants at the time of taking had received and would in all probability receive in the future 25c an acre for leasing all or a substantial part of the 26,000 acres. Further evidence sought to be introduced, including the testimony of Mr. Beam and of Mr. Valentine, would have established that there was considerable activity by the major oil companies and independents in the purchase and sale of mineral leases and mineral royalties and that the major oil companies in the area had paid from 25c to \$2.00 per acre for mineral leases. Said proffered testimony would have further established that in the opinion of the geologists and experts of the major oil companies, including Mr. Valentine of Shell Oil Company, the entire 26,000 acres which the appellants owned constituted an active leasing area of common knowledge among oil people and owners of real estate, R. 239, and that the factors present indicated the probability of the existence of gas or oil in the area. The offer of proof further stated that the testimony of Mr. Beam would establish that persons of ordinary business judgment were investing in mineral estates in the area, that is to say, buying a portion of the landowner's remaining interest after a lease to a major oil company. R. 240. Mr. Beam would also have testified that there is a very real value in a mineral lease and in

an option for a lease in a so-called wildcat area even though there has not been a strike of oil. R. 241. The offer of proof would further have established that the area was in the past for a minimum of eleven years a producing area for gas. R. 135.

Can it arbitrarily be said, without having heard the testimony of any one of the proffered witnesses, that the mineral interests in connection with the 26,000 acres of condemned land are valueless? Such a finding goes against common sense and logic. As a matter of fact, with the proffered evidence that major oil companies were then spending and have since spent money for oil leases and oil development, any reasonable person would admit that in the event of the sale of land, these factors would be considered by both the seller and the purchaser. As a result a higher price would be paid than if there were no activity whatsoever in connection with mineral leasing and exploration.

The property rights taken away from appellants by the sovereign without even nominal compensation are as follows:

1. Right to receive 25c per acre from Shell Oil Company under existing lease.
2. Right to receive 25c per acre from Regimbal or his assignee upon exercise of the option to lease.
3. Right to bargain for and sell leasehold interest to

major oil companies in any lands not covered by Shell lease or taken up by Regimbal, at 25c per acre or more.

4. The right to bargain for and sell a percentage or all of the interest of appellants in the mineral estate, whether they have previously leased to a major oil company or not.

5. The right to benefit as dominant owner of the mineral estate from possible oil or gas production.

The value of each of the above property rights would of course vary, from tremendous values if oil or gas were commercially produced in the area, to a lesser value based only on the income from leaseholds and mineral estates. R. 241.

However, if the evidence sought to be introduced was received, and properly presented in accordance with the offers of proof, the jury could find a minimum value to the dominant owners of the mineral rights, as lessors, of 25c per acre for the 26,000 acres. Ex. 96, 97. If the witnesses further established a market value in the dominant mineral estate, R. 240, which value was fixed at \$1.00 per acre for a half interest in a transaction relating to land in the immediate area, R. 76, then the jury could further find that said dominant mineral estate had a real and tangible value.

It appears in the record that a proffer was made that gas in commercial quantities was produced in the area

for a period of eleven to fourteen years, serving a substantial part of the Yakima Valley. R. 135, R. 173. Although this commercial production ceased some twenty-five years ago, this time span is insignificant in a determination of whether or not there is a reasonable possibility of oil or gas production in the area in question. In the past ten years, the major oil companies of the United States, faced with dwindling oil reserves, and greatly increased demand, have engaged in extensive oil and gas exploration, always necessarily preceded by intense activity in leasing of mineral rights and purchasing of mineral rights.

The instant case is the only one that has come to the attention of counsel for appellants where the Trial Judge, dealing with condemnation of lands in an active leasing area, and with severed mineral estates and leaseholds, rejected the admission of evidence and testimony at the time the proffers were made. There are cases where the Trial Court instructed the jury that the evidence was insufficient to warrant their considering mineral value; of instructions limiting the jury in the determination of mineral values; and of instructions setting forth the degree of proof necessary to establish mineral values. But in no other case did the Trial Court deny entirely to the landowners the opportunity to prove their case as to possible mineral values.

Consideration of cases involving leasehold interests

and mineral rights in the federal courts shows an increasing recognition by the courts that mineral rights, other than actual production of gas and oil, have a real and ascertainable value in our world of today.

In *Montana Railway Company v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 97, 34 L. Ed. 681, the Supreme Court, with reference to an undeveloped mining claim, said as follows:

“It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim which may be called ‘only a prospect,’ had a value fairly denominated a ‘market value,’ may be, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects were the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value.”

It is stated further:

“In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate.”

And in the *Eagle Lake Improvement Co. v. United States*, (5th C.C.A.), 141 F. (2d) 562, at 564, the Appellate Court stated:

“ . . . The instructions to which objection was made in substance charged that the jury should find the mineral interests valueless unless from the evidence

it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. Ed. 1236, elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' In any event, such leases have a nominal value."

In *Southern Pacific Railway Co. v. San Francisco Savings Union*, 79 Pac. 961, 964, the Supreme Court of California, referring to reservation of mineral rights by landowner in a deed to the railroad, said:

"It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said impossible to do it."

In the instant case appellants were never even given the opportunity to try, and it thereby became impossible to do it.

The most recent case in point is that of *Cal-Bay Corporation et al v. United States*, 9th Cir., 169 F. (2d) 15; cert. den., 69 S. Ct. 134; 335 U. S. 859; 93 L. Ed. 406,

The Trial Court in the Cal-Bay Corporation case gave an instruction in part to the effect that "Future income or speculative productive value contemplated is not a measure of condemnation value." The Court had refused to give the following instruction proposed by defendants:

"This action concerns the value of the gas and oil rights and the leases given for such development on the lands taken by the Government. Gas and oil leases are recognized by law as being property having a market value even if such leases are in undeveloped territory. Where gas and oil rights are concerned a reasonable probability of successful development is sufficient to make such leaseholds of great value. Where there is reasonable possibility of production in paying quantities gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value.

"There is a definite market value even where the prospects of successful development are too speculative to be reasonably probable. If the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transactions for valuable considerations, they have a market price translated into a fair market value for condemnation purposes."

The Appellate Court held that the Trial Court erred in refusing such an instruction, stating in part as follows:

"We think the district court erred in refusing such an instruction. We take notice that, in California, discovery in land of a reasonable probability of successful development of gas or oil gives great value to such land and that it has a market value even where the prospects of possible successful development are too speculative to be reasonably probable. The evidence, later quoted, shows there are hundreds of sales of

lessor and lessee rights in lands with such speculative value."

In the instant case, also, had the appellants been afforded the opportunity, they could have shown many sales of lessor and lessee rights in lands with speculative value, through the testimony of the proffered witnesses.

The Appellate Court in the Cal-Bay case stated further:

"That such speculative value is provable in such condemnation proceedings has been recognized by the Fifth Circuit in a case concerning such interests in lands in the southern district of the oil producing State of Texas. *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F. 2d 562, 564."

An application of the foregoing rules to the proffers made and evidence sought to be admitted justifies the assumption that if the appellants had been permitted to introduce said proof there would have been established additional values to be considered by the jury, within the limits of an appropriate instruction by the Court.

In the case of *Cal-Bay Corporation et al v. United States*, supra, and of *Eagle Lake Improvement Co. v. United States*, supra, it was held that erroneous instructions constituted prejudicial error. The instructions might well have led the jury to bring in a lesser amount and therefore the landowners would not have received "just compensation."

In the instant case, however, the effect of the erron-

eous exclusion of evidence is even more apparent. The jury was not permitted to even consider mineral values. The verdicts, therefore, could not, and did not, reflect any valuation whatsoever as to mineral rights, and could not represent "fair compensation."

It is conceded that if the rejected evidence had been admitted, and a proper instruction given, the jury might well have returned a considerably greater verdict, or perhaps only a nominal increase. But a determination of values is rightfully, and should have been, a matter for the jury to decide. These proffers related to material and relevant evidence. It was error to exclude them. See *Knollman v. United States*, 214 F. 106, 108.

The Trial Judge must necessarily have relied upon personal knowledge or belief or experience concerning oil and gas matters in order to arbitrarily reject the proffers of evidence. R. 89.

The Court acknowledged the increased activity here in this area. R. 252. Yet the Court substituted its judgment for that of the jury, and arbitrarily excluded the evidence and testimony which could well have established that said increased activity had brought with it a real and ascertainable value as to mineral leaseholds and mineral estates. The Court referred to the Martinez case, R. 89, stating that:

"Now I think in a prior case I did submit the rather tenuous proposition that the jury could find how much

the market value of the land had been enhanced by the possibility of leasing it for exploration purposes, but, frankly, I am getting a little concerned about that and doubtful about it."

Counsel for appellants pointed out that he could present a stronger case as to proof of mineral values than the Martinez case, because the area was an active leasing area at the time of taking in the instant case, and was not in the Martinez case. R. 134. The Court observed:

"Well, as far as my following this instruction is concerned it is helpful to have at hand what you have said in some prior case, but, of course, a judge should be like a wild goose, every day is a new day, and I am not bound to anything that I did even yesterday even as far as today is concerned." R. 135-136.

No fault can be found with this expression of judicial procedure, but it is most respectfully contended that the change of policy in this instance, which was reflected in the exclusion of material and relevant evidence, seriously prejudiced the entire case for the appellants.

The Trial Court emphasized its own error in excluding evidence of mineral values when it instructed the jury as follows:

"The Court has come to the conclusion as a matter of law, and you are instructed, that *there has been shown no substantial value* here for mineral rights and you are not to award any value for mineral rights." R. 260. (Italics mine).

It is difficult to conceive how the appellants could have "shown" value for mineral rights when they were

precluded from presenting the evidence they had assembled.

The Trial Court, in excluding the proffered evidence, attempted to justify its action as follows:

“Unless the land is a proved field or reasonably adjacent to a proved field . . . mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist here. And *having been through these cases before*, I don't think it is possible to show reasonable probability of gas and oil value under these lands.” (Italics mine). R. 89.

The testimony of the expert witnesses which the appellants sought to introduce, would have established the fact that proximity of land to a commercially producing mineral area does not of itself determine whether that land has sub-surface oil or gas. Land could lie one mile off an anticline or structure and be therefore devoid of even the possibility of having oil or gas. It is the sub-surface structure of the land, not the proximity to producing wells, that governs whether or not there is a reasonable possibility of valuable deposits being found. Yet the testimony which would have proven “reasonable possibility” was excluded.

The Court then stated, with reference to the Eagle Lake Improvement Co. case, *supra*:

“In Texas and under Texas law a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory, and I

submit this is not the law in this jurisdiction." R. 251.

The Court finally held that:

"I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

Appellants respectfully submit that the above reasons expressed by the Trial Court as basis for the refusal to permit evidence to be given as to mineral values incorrectly state the law in this jurisdiction, as set forth in the Cal-Bay Corporation case, *supra*. The Appellate Court therein cited with approval the language of *Eagle Lake Improvement Co. v. United States*, *supra*, at p. 564, yet the Trial Court summarily states that "this is not the law in this jurisdiction." R. 251. The Trial Court has misapplied the rule of "reasonable probability" R. 89, and refused to recognize the law of this jurisdiction that "where there is a reasonable possibility of production in paying quantities, gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value." This rule would be equally applicable to mineral rights of the dominant owner, in this case, the appellants.

2. Appellants Were Denied a Fair Trial and Due Process of Law.

The error of the Trial Court in denying admission of the exhibits and testimony in question would be directly reflected only in the single cause of action, Civil Case No. 892. However, by reason of the Court's conduct of the case it is the further contention of appellants that their entire presentation as to all four consolidated cases was prejudiced. By the arbitrary actions of the Trial Judge, counsel for appellants was prevented from making an orderly and persuasive presentation of appellants' case.

CONCLUSION

As to Civil Case No. 892, the rejection of proffered evidence as to mineral values is clearly reversible error. All property rights that were capable of being translated into value should have been permitted to be introduced into evidence and considered by the jury, subject to proper instructions in accordance with the laws of this jurisdiction. The direct consequence of the Trial Court's error was that the verdict of the jury as to Civil Case No. 892 was inadequate as a matter of law.

As to the leasehold cases, Civil Cases Nos. 452, 488 and 762, the Trial Court, in arbitrarily excluding evidence and testimony, seriously prejudiced the presentation of appellants' entire case. Such reversible prejudice would necessarily be reflected in the verdicts of the jury as to said leasehold cases as well as the fee simple title case.

It is respectfully submitted that the appellants have

been thereby deprived of just compensation under due process of law and are entitled to a new trial.

Dated, Yakima, Washington,
October 11, 1956.

WALTER V. SWANSON
DOUGLAS A. WILSON
Attorneys for Appellants

No. 15156

**In the United States Court of Appeals
for the Ninth Circuit**

**R. H. PHILLIPS AND JESSIE E. PHILLIPS, HIS WIFE,
R. R. HAGGERTY AND WINNIE HAGGERTY, HIS WIFE,
AND D. EVERETT PHILLIPS AND EVELYN PHILLIPS, HIS
WIFE, INDIVIDUALLY AND IN BEHALF OF THE COLD
CREEK COMPANY, A PARTNERSHIP, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION**

BRIEF FOR THE UNITED STATES, APPELLEE

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In the United States Court of Appeals for the Ninth Circuit

No. 15156

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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court over these four condemnation proceedings was invoked under the Acts of August 1, 1888, 26 Stat. 357, 40 U. S. C. sec. 257; August 18, 1890, as amended, 50 U. S. C. sec. 171 and under acts authorizing the takings and appropriating funds therefor (R. 23-24, 28). Judgments determining compensation were entered No-

ember 30, 1955 (R. 50-74). A timely consolidated motion for a new trial (R. 74-78) was denied on January 6, 1956 (R. 78-79), and notices of appeal were filed March 2, 1956 (R. 79-81). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the trial court erred in denying admission of the proof offered by appellants in support of their claim to separate mineral values of the 33,000-acre ranch condemned.

2. Whether, if there was error in such denial, it vitiated the entire trial determining market value and market rental value of the ranch.

STATEMENT

R. H. Phillips, D. Everett Phillips and R. R. Haggerty, with their wives, were the owners of a ranch in eastern Washington, of some 33,200 acres. Civil No. 892 is a proceeding commenced by the United States in February 1954, to condemn the ranch for use in connection with the Yakima Artillery and Anti-Aircraft Firing Range. Trial was consolidated with three other cases, Civil Nos. 452, 488, and 762, which were the taking of temporary use of portions of the ranch commencing February 1950, July 1950, and October 1952 (R. 257).

Extensive evidence was presented at the trial which commenced on October 24, 1955, and concluded with return of the jury's verdicts on November 4, 1955. Witnesses for both parties generally agreed that the best use of the property was for a cattle and sheep

range. As illustrated by testimony of the Government's expert C. Marc Miller in the printed record, considerable emphasis was given to sales of comparable properties (R. 106-121). Thus the instructions to the jury included consideration of sales of comparable properties and of properties condemned, the first of the ranches which had been consolidated into the property taken having been bought in June of 1948 (R. 146, 260-261). The court, in briefly commenting on the evidence, drew attention to the divergence of the experts as to which sales were of property comparable to that taken as explaining the wide spread between the parties' valuations (R. 268). In the fee-taking case the government witnesses had estimated value at \$335,000 and \$425,000, while three experts for the owners gave figures of \$1,461,340, \$1,450,154, and \$1,410,477 (R. 49). The jury's verdict for the fee taking was \$514,801.56 (R. 49).

The proceedings at the trial with regard to the claim of mineral values may be summarized as follows:

Prior to trial appellants had petitioned for a dismissal from the case of mineral rights but this petition was denied (R. 40-42). When the trial commenced on October 24, the court expressed its concern over the mineral rights question and referred to an earlier case where it had submitted to the jury the question of enhancement because of the possibility of leasing for exploration purposes. The court expressed doubt as to how, as a practical matter, proof could be given as to how much the possibility of leasing for exploration purposes would enhance the market value

of the land (R. 89-90). The subject was again briefly mentioned on October 31 with regard to exclusion of mineral rights reserved by the Northern Pacific Railway, which presented different questions arising out of the land grant to the railroad from the United States (R. 128-130). The following day, the mineral value question was adverted to briefly. Appellants' counsel stated that there was commercial production of gas within seven miles of this ranch for eleven years but which, as the court brought out, stopped in 1929 or 1931 (R. 134-136). At the end of that day's trial there was another colloquy which concluded with the court's suggestion that an offer of proof might avoid the need of calling witnesses (R. 172-175).

During the examination of one of the owners, Exhibit 96, an option for a mineral rights lease, and Exhibit 97, a lease to Shell Oil Company, were offered, not as to mineral values, but to show the state of the title (R. 206-209). After discussion, the court reserved a ruling until offer of proof should be made as to mineral values (R. 209-213). A similar ruling was made as to Exhibit 120, a mineral rights deed to the Cold Creek Company which is a partnership composed of the owners Phillips and Haggerty, plus Walter Swanson, who has a ten percent interest (R. 233-234).

At the end of the landowners' case the offer of proof was made, the matter was argued and the offer was denied (R. 236-254). In the subsequent instructions the jury was told that the court had concluded

that there had been shown no substantial value for mineral rights and the jury was not to award any value for mineral rights (R. 259-260). Appellants excepted to this instruction (R. 275).

ARGUMENT

I

The Court properly rejected the offer of proof of evidence seeking to establish alleged mineral values

We will discuss in detail the deficiencies of appellants' offer of proof later. However, we believe that its inadequacy is apparent when the question is asked, "How could the jury arrive at a dollars or cents figure for a mineral interest except by pure guess? The answer is, they couldn't. As the court said: "If they [the jury] returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether \$10 or \$500,000 of that was based upon their idea of what these minerals might be worth * * *" (R. 254).

A. A condemnation award may not be based on pure guesswork

Constantly reiterated is the thought that the award in a condemnation case must be fair both to the landowner and to the public. *United States v. Miller*, 317 U. S. 369 (1943). While just compensation includes all elements of value that inhere in the property, it does not exceed market value fairly determined. "Considerations that may not reasonably be held to affect market value are excluded. * * * Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably

probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.” *Olson v. United States*, 292 U. S. 246, 256, 257 (1934). “Value cannot be placed upon a remote possibility.” *Mayor and City-Council of Baltimore v. United States*, 147 F. 2d 786, 791 (C. A. 4, 1945); *People of Puerto Rico v. United States*, 132 F. 2d 220 (C. A. 1, 1942), certiorari denied, 319 U. S. 752; *Borough of Munhall v. United States*, 159 F. 2d 603 (C. A. 3, 1947); *Cameron Development Company v. United States*, 145 F. 2d 209 (C. A. 5, 1944). In *Sharp v. United States*, 191 U. S. 341 (1903), one of the reasons given for excluding evidence of an offer is that (p. 348): “Pure speculation may have induced it, a willingness to take chances that some new use of the land might in the end prove profitable.” While, as we discuss later, the nature of mineral operation, especially oil and gas, may require some modification of the “reasonably probable” language in application it does not justify departure from the rule excluding alleged values founded purely on conjecture. Cf. *United States v. Harrell*, 133 F. 2d 504 (C. A. 8, 1943).

B. Appellants made no offer to prove that the market value of the land was enhanced to any extent by the possibility, however remote, of the existence of minerals

Generally, property condemned by the United States is valued as an entity. The various components, such as timber, minerals, etc., are not separately valued

but are considered only to the extent that they enhance the value of the land as a unit. Thus, when value is founded, as it should be, on sales of comparable properties, the enhancement represented by those components is automatically reflected in the sales. Here, there was a great deal of evidence relating to the sales of the property condemned to appellants in 1948 and the following years and of sales of ranches in the neighborhood (see Statement, *supra*, p. 3). And existing mineral possibilities would be reflected in those prices. It should be noted that appellant D. Everett Phillips testified (R. 144):

Q. Is it true, as counsel brought out, that you bought it at range land prices?

A. Yes, that is one reason why the sales here are quite close together. We realized it as potential farm ground and naturally we made the deals as soon as we could.

The only mention of this subject in the offer of proof as to mineral values is that "the recent sales of lands that we have mentioned south of this and adjoining this property have all had a reservation of mineral rights in each case" (R. 240). Appellants did not offer to show that the sales the Government relied upon as comparable also included reservations of minerals by the vendor nor did they offer to show that the price obtained either in the Government's comparable sales or even in their own was any less because of the mineral reservation. There was, thus, a complete absence of evidence to show that the fee value was enhanced by the possibility of mineral ex-

traction or, put conversely, that the comparable sales, at least those relied upon by government witnesses, did not include every element of value present in the land.

The court suggested (R. 92) that oil production would not be inconsistent with agricultural value. We are not concerned here with minerals under production, but the effect, if any, upon market value of the possibility of existence of minerals. Thus, in affirming the ultimate award in *Eagle Lake Improvement Co. v. United States*, 160 F. 2d 182 (C. A. 5, 1947), appellants' prime authority (Br. 18-19, 21, 24-25), the Court of Appeals for the Fifth Circuit held that even when there were outstanding mineral leases that the owners of mineral interests were not entitled to a separate trial and that evidence of market value of the whole property was admissible. Appellants are in the contradictory position of asking for a reversal of the judgments in their entirety (see *infra*, p. 14) without offering any evidence indicating that market value of the property as a whole was enhanced because of the possibility of mineral development.

C. Appellants made no offer to show facts which would reasonably establish the existence of a market in mineral leases or mineral rights

In the trial court appellants' counsel frequently used the term "active leasing area." In the brief on appeal the claim is made that testimony of Mr. Beam was offered "as to dealings in mineral leases and rights in the area" (Br. 5), and, it is said that appellants "could have shown many sales of lessor and lessee rights in lands with speculative values" (Br.

21). But the basic defect in the offer of proof was the lack of showing of an active market. Contrary to the brief's statement, Mr. Swanson, in response to the court's question, said: "I'm not sure whether any of them have been sold in this area or bought excepting as part of the purchase and sale of all these ranches that are being purchased and sold in this area" (R. 171). And the offer of Mr. Beam, a so-called "lease man" was to show, not that trading in leases existed in the area, but only "that there is dealings in areas similar to this where there has not been a strike of oil" (R. 241).¹ This is a far cry from the situation to which appellants seek to equate this case (Br. 20), where "the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transactions for valuable considerations, they have a market price translated into a fair market value for condemnation purposes * * *." Appellant offered no evidence of such transactions for the obvious reason that they did not exist, as Mr. Swanson admitted. This was, we submit, fatal to the application of such cases as *Cal-Bay Corporation v. United States*, 169 F. 2d 15 (C. A. 9, 1948), certiorari denied, 335 U. S. 859, and *Eagle Lake Improvement Co. v. United States*, 141 F. 2d 562 (C. A. 5, 1944), and 160 F. 2d 182 (C. A. 5, 1947).

¹ Appellants' evidence did not even go so far as the testimony found insufficient in *United States v. Harrell*, 133 F. 2d 504, 508 (C. A. 8, 1943), where it was stated that oil and gas leases in general in unproven territory of the character there involved, in view of the evidence of possible future commercial production were reasonably worth from \$5 to \$50 per acre.

There is a great difference between an "active leasing area," so frequently referred to by appellants and an active market of mineral interests. The leases referred to are simply for exploratory purposes like that of the Shell Oil Company to the lands here condemned, Exhibit 97. This provided for a delay rental of 25 cents per acre per year and could be canceled by the company at the end of any year. The offer of proof went no further than to say that other major companies were securing similar leases in the area. There was no offer to show the existence of any competition between the companies or other persons creating a market. Certainly the fact without more that such exploratory leases have been taken by major companies does not show a market. As Mr. Swanson admitted, in every such lease the company has the right to cancel (R. 240). We are not here concerned with possible rights of Shell Oil Company, which has made no claim, but only with those of appellants. There is absolutely nothing to show possible salable value of the lessor's rights except for the 25 cents per acre per year rental. But the continuance in the future of that rental rests simply on the guess as to what the managers of the appropriate divisions of the Shell Oil Company might decide to do. The fact is well known that the major companies all have millions of acres under exploratory leases which are periodically reviewed for exploration, continued retention or discontinuance. Certainly just compensation should not rest on nor should

a jury be called upon to investigate the intentions of such managers as to this particular area.²

Exhibit 96, an option from appellants to Laurent Regimbal, has, if possible, even less bearing upon an alleged market value. It was simply an option to take an exploratory lease expiring December 31, 1955. To the other imponderables above mentioned is added the question as to how much land, if any (in quarter sections), the option might be exercised. The deed upon which appellants rely as having constituted a severance of the minerals from the land (R. 233) likewise has no tendency to establish any ascertainable market value. The deed, Exhibit 120, conveyed the minerals to a partnership in which the only outstanding interest was the 10% of Mr. Swanson. There is no indication of substantial consideration having been paid therefor. Certainly such a bootstraps arrangement cannot be used to establish rights to substantial compensation for such alleged mineral values. And it should further be noted that while Mr. Swanson appeared as a claimant in the court below and joined in the motion for a new trial (R. 74-76), he did not join as a party in the notices of appeal (R. 79-81) and hence does not appear in the caption of the case as a party. At best, the deed would be comparable to the transactions between the claimants in *United States v. Harrell*, 133 F. 2d 504, 508 (C. A. 8, 1943),

² Appellants are not entitled to recover the royalties or rentals they might possibly have secured. And "Probable future profits based upon conjecture are too remote to aid in the determination of market value." *Murdock v. United States*, 160 F. 2d 358, 360-361 (C. A. 8, 1947), and cases there cited.

which the court held "afford no substantial evidence of the real value of the leases."

Finally as to geological probabilities of oil or gas deposits the proffer simply is that there are several factors which govern the decision of a major oil company to explore for oil and "There are more than one of the factors present in the area here" (R. 239). Thus, no attempt was made even to show a chance geologically of commercial oil discovery but only the possibility that a major oil company might take some exploratory action. The one physical fact—that for eleven years ending in 1929 or 1931, there had been gas production some seven miles from the Phillips-Haggerty ranch—tends to discredit rather than support the hope of existence of commercially profitable deposits just as a dry hole does. The failure to reactivate that production for more than 25 years is like the iron mine which had not been worked for 30 years where the court said: "If there was present all of the value testified to, it seems inconceivable to me that it would not long ago have been retrieved." *United States v. Certain Lands, Etc.*, 51 F. Supp. 66 (S. D. N. Y., 1943). Clearly there was no substantial evidence of even a remote possibility of valuable mineral deposits.

D. The decided cases do not support appellants' claims

We have pointed out that here there was no market, active or otherwise, in mineral interests nor was there any fact tending to indicate the presence of minerals such as would create traffic among persons hoping to profit from exploitation of oil and gas. Facts justify-

ing such a belief were however present in every case sought to be invoked by appellants (Br. 17-19). Thus *Montana Railway Company v. Warren*, 137 U. S. 348 (1890), involved a mining claim adjoining the Anaconda claim, which had already been developed "with indications that the vein within such mine extends into this claim" (137 U. S. at p. 353). *Eagle Lake Improvement Co. v. United States*, 141 F. 2d 562 (C. A. 5, 1944), concerned, as stated by the second opinion in that case, 160 F. 2d 182 (C. A. 5, 1947), lands which lay "north and northwest of a number of oil producing wells in the Flour Bluff Oil Field." And in *Cal-Bay Corporation v. United States*, 169 F. 2d 15 (C. A. 9, 1948), certiorari denied, 335 U. S. 859, there was, in the words of this Court, "evidence that a well drilled upon it disclosed gas in commercial quantities," the well having cost over \$250,000.

The present case bears not the slightest resemblance to those cited. Unless the fact alone that the Shell Oil Company had an exploratory lease, cancellable in any year on 1685.60 acres out of the 33,000 acres taken is substantial evidence of a market and can constitute the sole basis for establishing a market value for those mineral rights, appellants' claim must fail. Our discussion, we believe, has made it clear that the answer to the question posed at the commencement of our argument is that no possible ground is given from which the jury could logically determine a verdict of \$10 rather than \$100,000 or \$1,000,000. The court was, therefore, entirely justified in refusing to permit confusion of the record by evidence which could not possibly be the basis for a legal verdict.

Any error in exclusion of evidence as to mineral values does not justify a new trial as to matters submitted to the jury

Appellants argue that all of the cases and issues should be retried, asserting that "their entire presentation as to all four consolidated cases was prejudiced" (Br. 26). The record is devoid of a single fact lending support to this notion and appellants suggest none, aside from characterizing the court's well-considered ruling as "arbitrary" (Br. 26), and charging it with having "a partisan attitude" (Br. 10). The mere fact of consolidation does not require reversal as to issues unrelated to the error. *Phillips v. United States*, 206 F. 2d 867 (C. A. 9, 1953). The mineral claim has no connection with the three leasehold cases. And the verdict as to market value of the fee title should not be disturbed since appellants' claim is not to enhancement of market value of the fee as shown by comparable sales but is for a separate mineral value in addition to the ranch value award (see *supra*, p. 68). No justification exists for imposing upon the court and the parties a lengthy retrial upon that matter. We submit that even should this Court find that error was committed in the exclusion of the offered evidence, the retrial should be limited to mineral values.

CONCLUSION

For the foregoing reasons it is submitted that the judgments of the district court should be, in all respects, affirmed.

Respectfully,

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DECEMBER 1956.



IN THE

**United States Court
of Appeals**

FOR THE NINTH CIRCUIT

R. H. PHILLIPS and JESSIE E. PHILLIPS,
his wife, R. R. HAGGERTY and WINNIE
HAGGERTY, his wife, and D. EVERETT
PHILLIPS and EVELYN PHILLIPS, his
wife, individually and in behalf of the
Cold Creek Company, a partnership.

Appellants,

No. 15156

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

FILE

DEC 24 1956

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IN THE
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Appellants,

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vs.

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APPELLANTS' REPLY BRIEF

I

The Court improperly rejected Exhibits 96 and 97, as well as the offer of proof of further evidence, written and oral, that would have established a value to appellants' mineral estate and leasehold interests, contrary to main contention disclosed by appellee's brief.

1. *The Trial Court's Ruling Was Arbitrary, Prejudicial and Seemingly Preconceived.*

The record discloses that, prior to any testimony, the trial court stated to counsel its position with regard to the admission of evidence as to mineral values, saying in part:

“Unless the land is a proved field or reasonably adjacent to a proved field, *which isn't the situation here*, that mineral value, as such, cannot be made the basis of compensation, unless there can be shown reasonable probability that they exist there. And having been through these cases before, *I don't think it is possible* to show reasonable probability of gas and oil values under these lands.” R. 89.

Appellants' presentation of their case was of course prejudiced by the trial court's erroneous adoption of the reasonable proximity and the “reasonable probability” rules. (See Brief for Appellants, p. 23-25). But equally as important, the trial court's statements clearly indicated that it had predetermined the matter of admission as to mineral values.

The fact of material values in mineral rights was not conceived after the declaration of taking, as inferred by appellee and the lower court, but on the contrary was born of actual major oil company leases, options and rental payments to the appellants. All of this preceded the declaration of taking. Rejected Ex. 96, 97.

Certainly a contractual rental income such as the offer of proof encompassed cannot be, *prima facie*, so speculative as to excuse the lower court's arbitrarily deciding the jury fact of presence or absence of value against the landowner, without permitting the introduction of any

evidence whatsoever. Both the trial court, R. 253-254, and counsel for appellee, R. 91, expressed great concern that an error in the form of evidence of a speculative nature might slip into the record. Yet after the admission of appellants' projected evidence, the trial court could certainly, and without insuperable difficulty, protect both itself and the parties by proper instructions, thus minimizing the possibility that "the case would be upset in the Court of Appeals." (Trial Court's ruling as to rejection of Evidence, R. 254).

A preconception of no value, as expressed by the trial court prior to the trial of the cause, and as reflected in its rejection of evidence without hearing testimony, is not a proper exercise of judicial discretion, and constitutes an invasion of appellants' constitutional right to their "day in court."

2. *Appellants' Offer of Proof Was Sufficient.*

The appellee has questioned the sufficiency of the offer of proof made by appellants. (Appellee's Brief, p. 6-10). Generally, of course, an offer of proof must be sufficient to advise the trial court so that it can understand what is sought to be shown. In the instant case there can be no question but that the trial court was fully advised by the offer of proof. In fact, the Court itself had suggested that the formal offer be deferred to the conclusion of the presentation of the appellants' case. The Court and counsel discussed the form of the offer of

proof, R. 236, 237, and the Court agreed that Mr. Swanson, on behalf of the appellants, could make the offer "as a whole" rather than by relating specific facts to specific witnesses, and that "it doesn't make any difference" to the trial court. R. 237. It was stipulated that it would be unnecessary to call the individual witnesses to the stand and that appellants' rights would be fully preserved by Mr. Swanson's making the offer of proof without putting on witnesses. R. 236. The Court clearly indicated that it was fully advised as to the nature of the evidence offered and the purpose for which it was being offered. R. 252, 253. No objection was made to the form of the offer of proof. The fact that it was largely generic rather than specific in nature was approved by the trial court, R.236-237, and agreed upon by counsel, who made no motion to make more definite. Counsel for appellants was in a situation somewhat similar to that referred to in the case of *Bates v. Oregon-American Lumber Co.*, 295 Fed. 1, at p. 6, where "the Court indicated its mind was made up that no such proof could be made; that is to say, the offer of proof was reduced to a mere formality." R. 89, 252-253.

3. *Lower Court Misinterprets Pertinent Rules Pronounced By Ninth Circuit.*

The real question before the Court is whether the trial court, after being continually advised throughout the trial that appellants intended to establish the value of their mineral estate and the value of their mineral lease-

holds as an "element of value" in determining a true market value, committed error in refusing appellants an opportunity to prove their case by competent testimony and exhibits. Appellants sought the introduction of Exhibit 96, the option to lease, and Exhibit 97, the Shell Oil Company lease, R. 207-210. These documents on their face would have established that appellants were receiving twenty-five cents an acre per year for mineral leases then in effect, together with the probability of continued revenue in the future. Granted, both documents were in form subject to cancellation, but so are most leases written by major oil companies. The mere fact of the possibility of cancellation does not negate value. In *U. S. v. Jaramillo*, 190 F. (2d) 300 (Tenth Circuit) it was held that it is proper for the jury to consider cancellable rights, provided also that consideration is also given to the possibility that the rights might be withdrawn.

In addition, if the appellants had been permitted to proceed in a proper manner with the introduction of evidence, they would have introduced evidence of every transaction involving mineral leases of major oil companies as to the area in question. R. 239. The introduction of such evidence through Mr. Valentine of Shell Oil Company would necessarily establish the rental payments under said leases and the fact that the subject lands were a part of an increasingly active leasing area. Through the testimony of Mr. Beam of Carter Oil Company, now consultant to the Northern Pacific Railroad Co., a value as to

the mineral estate underlying the leasehold interests would have been developed. R. 240. Certainly, Mr. Beam and Mr. Valentine could qualify as experts for the purpose of giving testimony relative to the actual value of the mineral interests of the appellants.

When an offer of proof is rejected, it must be presumed that the party making said offer was able to prove what he offered to prove. *Tilley v. Cook County*, 103 U. S. 155, 26 L. Ed. 374. In the instant case, the trial court, even though it necessarily must have assumed that all the facts set forth in the proffers could be and would be proved, still ruled against the admission of said evidence, basing said ruling on its erroneous interpretation of the law.

The trial court stated as follows:

“In Texas and under Texas law a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory, and I submit this is not the law in this jurisdiction.” R. 251.

This in fact is the law of this jurisdiction, as set forth in the case of *Cal-Bay Corporation, et al v. United States*, Ninth Circuit, 169 F. (2d) 15. The trial court further emphasizes its error by stating further that since “this land is not *in or anywhere near a commercially producing mineral area*, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.” R. 252-

253. It therefore is apparent that the trial court rejected the offers of proof, not because material values could not be shown, but because the mineral interests related to an "undeveloped territory" and "not in or anywhere near a commercially producing mineral area, gas and oil area," R. 253, and further that in the Court's opinion, it was not possible to show "reasonable probability of gas and oil values."

The trial court's own language, tested by the law of *Eagle Lake Improvement Co. v. United States*, 141 F. (2d) 564, and *Cal-Bay v. United States*, *supra*, points out clearly that the Court erred in its interpretation and application of the law of the Ninth Circuit.

4. *Appellants' Leasehold Interests Are Ascertainable Elements of Value in Determining True Rental Value.*

Every mineral acre owned by appellants was under contract, 26,000 acres in all. Ex. 96, 97. This could not be an instance of "probable future profits based upon conjecture," *Murdock v. United States*, 160 F. (2d) 358, 360, but a definite contractual value existing prior to the declaration of taking. The value of appellants' right to lease was a minimum of 25c per acre or \$6,500.00 a year. This element of value should have been submitted to the jury for their consideration in the assessment of market value. Otherwise, how could one say that the appellants have received "the full and perfect equivalent in money for the property taken," *United States v. Miller*, 317 U. S.

369, as to all the elements of value that inhere in the property. An annual income of \$6,500 is a material asset deserving of appraisal consideration.

5. *Offer of Proof Would Have Established Definite Probability of Mineral Values, and Consequent Value to Appellants' Mineral Royalties.*

The appellants' offer of proof included the testimony of head geologist, Mr. Valentine, of Shell Oil Company, that the existence of gas and oil in the area, including the subject lands, is probable, based upon presence of the factors on the condemned land which indicate the existence of gas or oil. R. 239. Appellee's contention that "no attempt was made even to show a chance geologically of commercial oil discovery" (Appellee's Brief, p. 12) is therefore untrue. It should be emphasized that appellants were not required by the trial court to make a detailed offer of proof. Appellants' offer of proof clearly encompasses the question of probability or possibility of oil or gas in commercial quantities.

Once the probability or even the possibility of oil or gas under the subject lands is established by competent evidence and testimony, the retained 12½% of the appellants' royalties under their leases to major oil companies would then have a real and ascertainable value. The rejected testimony of expert witnesses would have established the probability of oil beneath the subject lands, and

thereby would have proved an existing market value as to the retained mineral royalties.

6. *Active Leasing Area Establishes Market in Mineral Rights.*

The appellee in its brief asserts that the "basic defect in the offer of proof was a lack of showing an active market." (Appellee's Brief, p. 9). In the offer of proof appellants propose to show, by testimony and introduction of leases, "that this area does, therefore, constitute an active leasing area of common knowledge among oil people and owners of real estate." R. 239. Certainly, "an active leasing area" presupposes the existence of demand and a market in mineral leases and mineral rights. Logic dictates that you can't have one without the other. Every fact sought to be introduced by the appellants under their offer of proof would contribute to the proof of the existence of a market in mineral leases and mineral rights.

II

The error in exclusion of exhibits and testimony necessitates a new trial as to all four consolidated cases.

1. *The Rejected Evidence Precluded Jury From Determining All "Elements of Value" As to Appellants' Fee Interest.*

Appellee has been forced to adopt an inconsistent position with regard to the question of whether or not the mineral interests are severable from the remaining fee interest. On page 8 of its Brief, appellee cites authority

that "even when there were outstanding mineral leases . . . the owners of mineral interests were not entitled to a separate trial and that evidence of market value of the whole property was admissible." Appellee then takes an inconsistent position in asking that even though there was error, the re-trial should be limited to mineral values. Appellee's Brief, p. 14. The appellants, by stipulation with the government, sought to separate mineral values from the remaining value, but this was refused. R. 92. The mineral values cannot now be separated. The error is necessarily one that affects Civil Case No. 892 in its entirety in that mineral values are additional "elements of value" in determining reasonable market value of appellants' fee interest.

2. *Rejection of Proffers Substantially Reduces the Jury Verdicts As to the Three Leasehold Cases.*

Appellee's Brief states categorically that "the mineral claim has no connection with the three leasehold cases." This statement is not supported by logic or fact. The absence of testimony as to income from appellants' mineral leases has a direct effect on the market value of leasehold interests as to Civil Cases 452, 488 and 762. Rent from agricultural use is no better than rent from mineral leases in determination of a rental verdict.

Inasmuch as Appellee's Brief indicates a lack of understanding as to the leasehold cases, a brief summary seems in order.

The annual agricultural rental values of said condemned leaseholds were fixed by appellee's chief appraiser, C. Marc Miller, as follows: (R. 124-128).

Civil Case No. 452—4,086.69 acres—\$1,225.00 annual rental, or approximately 30c per acre.

Civil Case No. 488—3,034.84 acres—\$759.00 annual rental, or approximately 25c per acre.

Civil Case No. 762—6,868.22 acres—\$1,370.00 annual rental, or approximately 20c per acre.

The alleged average annual rental per acre for all of the condemned property is less than 24c per acre. Therefore if the rejected exhibits 96 and 97 had been admitted, and oral testimony permitted, it would have been established that as to 1,685.60 acres of the above property, appellants had contracted to receive, and were receiving, 25c per acre for mineral rental in addition to alleged value for agriculture only. Inasmuch as C. Marc Miller had appraised the annual rental per acre at less than 25c, the jury, had they been permitted to consider the annual rental per acre then being received by appellants for mineral leaseholds, would have been compelled to at least double their verdict as to the leasehold condemnation of the above acreage.

The above mathematical computation clearly illustrates that the exclusion of evidence as to yearly payments under existing oil leases directly and prejudicially affected Leasehold Cases Nos. 452, 488 and 762.

CONCLUSION

Appellee asks the question, "How could the jury arrive at a dollar or cents figure for a mineral interest except by pure guess?" (Appellee's Brief, p. 5).

The answer is, the jury couldn't, for the reason that appellants were precluded from presenting the evidence that would have established substantial mineral values. The property owners should have been given a full opportunity to present their case and to prove all elements of value. The rejection of evidence by the trial court prior to submission would seem to contain an element of "guessing" on the part of the Court even more dangerous than the possible guess of a juror as referred to by the appellee.

Mineral royalties and mineral leases are rights of great benefit to the landowners throughout the United States whose properties are situate in geologically potential oil or gas bearing areas. The subject lands and surrounding area have been the scene of greatly increased activity on the part of major oil companies. (R. 52). The Northwest is a large consumer of oil products and gas, the oil products being hauled approximately 1,000 miles and the gas piped over 2,000 miles from producing areas.

"We think the courts are entitled to take notice of the condition and development of the petroleum industry," *Gilbreath v. State Oil Corp.* (C.C.A. 5), 4 F. (2d) 232,

233; see also *People v. Associated Oil Co.* (1930) 211 Cal. 93, 105.

The trial court has exceeded discretion in predetermining in effect that a potential oil field has no value until the day after oil or gas is surfaced. To so hold is to negate the value of modern geology and research.

The appellants should therefore be granted a new trial as to the entire cause.

Respectfully submitted,

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Attorneys for Appellants

December 20, 1956.



No. 15,162 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BASILIO FUGIANI,

Appellant,

vs.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco, California,

Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court, dated April 3, 1956, dismissing appellant's complaint on the ground that judicial intervention is not warranted. (App. A.) The jurisdiction of the District Court was invoked under 5 U.S.C. 1009, and 28 U.S.C. 2201. This Court has jurisdiction on appeal under 28 U.S.C. 1291.

STATUTES INVOLVED.

Section 212 of the Immigration and Nationality Act of 1952, insofar as pertinent to the present proceedings, provides as follows:

“Excludable classes of aliens; non-applicability to certain aliens; waiver of requirements; parole of aliens; report to Congress; suspension of entry by President.

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact.”

(66 Stat. 182; 8 U.S.C.A. 1182(a)(19).)

Section 242 of the Immigration and Nationality Act of 1952, insofar as pertinent to the present proceedings, provides as follows:

“Apprehension and deportation of aliens—arrest and custody; review of determination by Court:

* * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable

for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.

* * * *

(4) No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”

(66 Stat. 208, 8 U.S.C.A. 1252 (b).)

STATEMENT OF THE CASE.

Appellant is a native and citizen of Italy who was admitted to the United States as a nonimmigrant under Section 3(2) of the Immigration Act of 1924 at the Port of New York, New York, on February 22, 1950. On March 28, 1950, appellant married a citizen of the United States. Subsequently, he voluntarily appeared at the Immigration and Naturalization Service and applied for discretionary relief. Thereafter the Immigration and Naturalization Service granted the appellant the privilege of voluntary departure and preexamination, with an alternative order of deportation if he failed to avail himself of those privileges. (Exh. 1, Order Dated 9-24-52.) While processing his application for preexamination with the United States Consulate General, Vancouver, B. C., Canada, the appellant was informed by that office, in a letter dated November 25, 1952, that information on file at the Consulate General indicated that the appellant “was previously married to a German girl while he was a prisoner of war in Germany.” (Exh. 2.)

Immediately following receipt of the foregoing information, appellant directed inquiries concerning this matter to his sister then residing in his native city of Fabriano, Province of Ancona, Italy. In letters dated December 6th and 8th, 1952, appellant was informed by his sister that the official records of the Township of Fabriano indicated that he (appellant) was married in Berlin, Germany in 1945 and that such record of marriage had been forwarded to the Township of Fabriano, Italy on March 20, 1950 by the Foreign Ministry at Rome. (Exh. 1 [Exh. A of hearing dated 8-4-53].) On February 6, 1953, an attorney in Fabriano, Italy, acting under authorization of the appellant, commenced an annulment action, seeking a decree declaring the purported marriage of appellant and one Elly Porg to be void and nonexistent on the ground that appellant at no time had an intention to contract matrimony with the person identified as Elly Porg and that the appellant at no time had conjugal relations with that individual. Trial of the foregoing matter was held in the appropriate Court of Italy, at Ancona on June 27, 1953, at which time the party identified as Elly Porg appeared and testified concerning the purported marriage. A decree annulling the marriage was entered on June 27, 1953, and recitals in such decree show the testimony of Elly Porg to the effect that appellant was tricked and deceived into marriage on the pretext that he was simply signing papers to obtain food; that there were no conjugal relations and that the deception as to appellant's marriage was not revealed to him. (Exh. 4.)

On July 29, 1953, a Special Inquiry Officer of the Immigration and Naturalization Service, San Francisco, California, without notice, entered an order directing that the deportation proceedings of the appellant be reopened and that the prior order granting voluntary departure with the additional privilege of preexamination be withdrawn. (Exh. 1, Order dated 7-29-53.) Following further hearings conducted by the Immigration and Naturalization Service, the Special Inquiry Officer directed that the appellant be deported from the United States since "the record in this case clearly indicates that the (appellant) attempted to obtain an immigration visa for admission to this country through fraud and that he carefully concealed from the authorities that he had been previously married." (Exh. 1, Order dated 9-25-53.) The order of the Special Inquiry Officer was affirmed by the Board of Immigration Appeals. (Exh. 1, Order dated 10-5-54.) It is from these decisions that judicial review is sought.

SPECIFICATION OF ERRORS.

That the District Court erred in concluding that the decision of the Immigration and Naturalization Service is based upon reasonable, substantial and probative evidence.

That the District Court erred in concluding that the appellant had been given a fair and impartial administrative hearing.

That the District Court erred in concluding that all of the circumstances disclosed in the record did not warrant judicial intervention.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The sole question to be determined at this time is whether the appellant sought to procure a visa or other documentation by fraud or by wilfully misrepresenting a material fact, within the meaning of Section 212(a) (19) of the Immigration and Nationality Act. This issue is of vital importance, because if it is determined that such is the case appellant would thereafter be ineligible to obtain an immigration visa or reenter the United States even temporarily.

ARGUMENT.

JURISDICTION.

It has been held that an alien whose deportation has been ordered administratively under the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C.A. 1101, et seq., may obtain a judicial review of such order in a Federal District Court for a declaratory judgment and injunction under Section 10 of the Administrative Procedures Act, 66 Stat. 237, 243; 5 U.S.C.A. 1009.

Shaughnessy v. Pedreiro, 1955, 349 U.S. 48, 99 L. Ed. 868.

It has also been held that where the eligibility of an alien depends upon the status of the alien and where such status is in dispute, judicial review is available. *McGrath v. Kristensen*, 1950, 340 U.S. 162, 169; 95 L. Ed. 173.

CONSEQUENCES OF THE ADMINISTRATIVE DECISION.

The administrative record in this case shows that the appellant was, in September, 1953, found eligible for the privilege of voluntary departure and preexamination. Preexamination is an administrative process whereby it is possible for an alien in this country, under certain circumstances, to secure an administrative determination of his eligibility for lawful readmission to this country for permanent residence prior to his departure. That privilege was withdrawn in this particular case when the Special Inquiry Officer concluded that the appellant was an alien ineligible for readmission on the ground that he was a person excludable under the statutory provisions of Section 212(a)(19) of the Immigration and Nationality Act of 1952. The violator of that provision is permanently barred from entry into the United States. Once an alien comes within the confines of that section he may not thereafter, except in limited cases which are not applicable here, ever legally enter the United States. The severity of the penalty imposed by that section causes the appellant to seek review of the administrative determination at this time.

In the instant matter, unless the appellant can remove the administrative determination that he is in-

eligible for readmission to the United States under Section 212(a)(19), he will be forever barred from rejoining the citizen members of his immediate family in the United States. The factual situation here will clearly establish that this appellant at no time sought to procure an immigration visa or any other documentation to enter the United States by fraud or by wilful misrepresentation of a material fact.

FRAUD AND WILFUL MISREPRESENTATION.

Although the language of the statute is in the disjunctive, it is believed that the word "fraud" and the term "wilful misrepresentation" present two alternatives that are not substantially dissimilar. The phrase "wilful misrepresentation" should be read as requiring the misrepresentation to be of the same quality as does fraud. This result can readily be reached if the term "wilful" requires that the misrepresentation be made with knowledge and with actual intent to deceive.

The term "fraud" is not defined in the Immigration and Nationality Act. It should, therefore, be given its commonly accepted legal construction, that is—as consisting of false misrepresentations of a material fact made with knowledge of its falsity and with intent to deceive the other party.

U. S. v. U. S. Cartridge Co., 95 F. Supp. 384, 385, affirmed 198 F. 2d 456, Cert. denied, 345 U.S. 910.

In *Tucker's Lessee v. Moreland*, 1836, 35 U.S. 58, 78, 9 L. Ed. 345, Mr. Justice Story stated:

“Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.”

More than a century later, Mr. Justice Minton in *United States v. Wunderlich*, 1951, 342 U.S. 98, 100, 96 L. Ed. 113, expressed the same view that:

“By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. * * * fraud should be alleged and proved, as it is never presumed.”

Consequently, fraud is not established by proving that an incorrect statement was made. Proof of knowledge and actual intent to deceive are essential elements.

See

Pinkus v. Walker, 338 U.S. 269, 276-277, 94 L. Ed. 63.

In *Bridges v. Wixon*, 326 U.S. 135, 147, 89 L. Ed. 2103, the Supreme Court held:

“In that connection it must be remembered that although deportation technically is not criminal punishment (citations), it may nevertheless visit as great a hardship as deprivation of the right to pursue a vocation or a calling. (citations) As stated by Mr. Justice Brandeis speaking for the Court in *Ng Fung Ho v. White*, 259 US 276, 284, 66 L. Ed. 938, 942, 42 S. Ct. 492, deportation may result in the loss ‘of all that makes life worth living.’ ”

The Court of Appeals for the Tenth Circuit in *Pacific Royalty Company v. Williams*, 227 F. 2d 49 at page 55 stated:

“The essential elements of actionable fraud are a false representation of a material fact, knowledge of its falsity when made, intent to deceive, and reliance thereon with resulting damages. 17 Words and Phrases, Fraud, p. 522; 37 C.J.S., Fraud, Sec. 3; Southern Development Co. of Nevada v. Silva, 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678; Davis v. Wilson, 8 Cir., 276 F. 672; Pace v. Parish, Utah, 247 P. 2d 273; Wishnick v. Frye, 111 Cal. App. 2d 926, 245 P. 2d 532; Thompson v. Teel, 204 Okl. 105, 226 P. 2d 395; Koen v. Cavanagh, 70 Ariz. 389, 222 P. 2d 630. Fraud will never be presumed and will be sustained only upon evidence that is clear and convincing. 37 C.J.S., Fraud, Sec. 114; Southern Development Company v. Silva, supra; Union Railroad Co. v. Dull, 124 U.S. 173, 8 S. Ct. 433, 31 L. Ed. 417; Davis v. C.K.R., 10 Cir., 184 F. 2d 86; Greene v. Esquibel, 58 N. Mex. 429, 272 P. 2d 330; Jones v. Citizens Bank of Clovis, 58 N. Mex. 48, 265 P. 2d 366; Frear v. Roberts, 51 N. Mex. 137, 179 P. 2d 998; Consolidated Placers, Inc., v. Grant, 48 N. Mex. 340, 151 P. 2d 48.”

In this case, appellant admits that he notified both the Immigration and Naturalization Service and the American Consulate General at Vancouver, that he had never been previously married. However, there is a complete absence of any evidence that the appellant knew, or had any reason to know, or that he believed that he had ever been previously married. Matter of fact, there is reasonable, substantial and

probative evidence which clearly establishes that this appellant, prior to November of 1952, had no knowledge whatsoever concerning the marriage alluded to in the administrative decision. This significant fact is completely ignored in that decision.

The administrative agency has "over-stepped the boundaries of interpretation" and hence has exceeded the statutory authority. *F.C.C. v. American Broadcasting Co.*, 1954, 347 U.S. 284, 296, 98 L. Ed. 699. The action taken falls within the judicial construction of denial of due process of law. Cf. *Shaughnessy v. Mezei*, 1953, 345 U.S. 206, 97 L. Ed. 956; *Joint Anti-Fascist Refugee Committee v. McGrath*, 1951, 341 U.S. 123, 95 L. Ed. 817; *Wong Yang Sung v. McGrath*, 1950, 339 U.S. 33, 94 L. Ed. 616.

APPELLANT'S MARITAL HISTORY.

Appellant was born in Italy on February 28, 1915. During World War II, he was inducted into the armed forces of Italy, and was taken prisoner by the German army after the fall of Mussolini and the refusal of the Italian army to fight with Germany. Taken to Berlin in March, 1943 (Exh. 1. [P. 11, hearing dated 8-4-53]), he was held prisoner by the Germans until the fall of Berlin, when he came into the hands of the Russians. With three other Italian prisoners of war, he escaped from the prison camp and all four took refuge in a home in Berlin, occupied by one Elly Porg and her father. They remained in hiding in the attic of this home for approximately two weeks, and appellant left it only when he was able to escape

and make his way at night to the American Zone. (Exh. 1. [P. 16, hearing dated 8-4-53.]) While at the Porg home, Mr. Porg suggested that the four escaped prisoners sign papers in order to obtain food. Appellant and his three compatriots all signed some papers at that time, such papers being in the German language which none of them could speak or read. (Exh. 1. [P. 15, hearing dated 8-4-53.]) It was asserted that they communicated with Mr. Porg and his daughter by drawing pictures on paper. (Exh. 1. [P. 15, hearing dated 8-4-53.]) Appellant remained in the American Zone for about ten days, was given food, a physical examination and repatriated to Italy.

On December 12, 1949, respondent was issued an Italian passport by the police at Fabriano, Province of Ancona, Italy. (Exh. 1. [P. 22, hearing dated 8-7-53.]) This passport showed him to be single. It is the practice in Italy to annotate birth records to show the marriage of the subject. (Exh. 1. [P. 16, hearing dated 8-4-53.]) Appellant's birth record was so annotated when the record of the alleged marriage of the appellant and Elly Porg was forwarded to the Township of Fabriano, under date of March 20, 1950, by the Foreign Ministry at Rome, a date which was subsequent to appellant's arrival and admission to this country.

On November 25, 1952, the United States Consul James E. Callahan, at Vancouver, wrote appellant's representative that information contained in his file indicated that the appellant was previously married to a German girl while he was a prisoner of war in Germany. Appellant has asserted that this was the

first information that he ever received that he had been previously married. (Exh. 1. [P. 17, hearing dated 8-4-53.]) Immediately upon receipt of the letter of the Consulate, appellant wrote to his sister in his native city, and asked her assistance. His sister replied on December 6th and December 8, 1952. An annulment proceeding was filed in appellant's behalf on February 6, 1953 and a decree of annulment (after trial was held at Ancona, Italy at which time the girl Elly Porg appeared and testified) was entered on June 29, 1953. The Italian Court found that there had been no conjugal relations; that the appellant was deceived into marriage and that the appellant did not know that he was contracting marriage when he executed certain documents in the German language while he was an escaped prisoner of war in Germany. We submit that every action taken by appellant is completely in accord with his repeated contention that he knew nothing of this purported marriage until advised by the United States Consulate General at Vancouver, that a record of such marriage existed in Italy. Both parties to the "ceremony" testified under oath in two separate and different proceedings that the appellant did not intend to be married and that the appellant did not know that he was taking part in any act which constituted a marriage. Further, the judgment of the Italian Court embodies recitals which clearly support appellant's contentions.

It is well realized that the full faith and credit provisions of the Constitution of the United States have no application to foreign judgments, but generally as a matter of comity judgments of foreign

courts are given conclusive effect and full faith and credit, provided such judgments are not tainted with fraud. Following the general rule that the laws of one nation will, by what is termed the comity of nations, be recognized by another, except under certain circumstances, the administrative decision now under consideration, which completely disregards the uncontroverted judicial decision of the Court of Italy, is wanting in due process of law. Section 242 of the Immigration and Nationality Act sets forth the statutory requirement that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Applying that principle to the factual situation in the matter now before the Court, it must be determined that the conclusions of the administrative decision are unsound and without foundation as a matter of law.

In the leading case of *Hilton v. Guyot*, 159 U.S. 133, 202, 16 S. Ct. 139 (40 L. Ed. 95), the Supreme Court lays down the following rule for impeachment of judgments of courts of foreign countries:

"Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of

this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.”

The holding in the *Hilton* case, *supra*, is set forth with more particularity in the syllabus at 159 U.S. 133, as follows:

“When * * * the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the courts of civilized jurisprudence, and are stated in clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it is not entitled to full credit and effect.”

Unless some special ground for impeaching it is shown, the doctrine now generally prevails in this country that a foreign judgment is conclusive on its merits and not open to review or reexamination, if it was rendered by a Court of competent jurisdiction, if it was free from fraud and if the system under which the case was tried in the foreign court is likely to secure the impartial administration of justice.

Also compare:

Ingenohl v. Olsen & Co., 273 U.S. 541, 71 L. Ed. 762;

Aetna Life Insurance Company v. Tremblay, 223 U.S. 185, 56 L. Ed. 398;

Spann v. Compania Mexicana Radiodifusora Fronteriza, 5 Cir., 1942, 131 F. 2d 609.

The Supreme Court of California in *Rediker v. Rediker*, 35 Cal. 2d 796, 221 P. 2d 1, held that a foreign decree of divorce would be entitled to as much force and effect in California as a decree of a sister State under the full faith and credit provisions of the Constitution of the United States. Appellant's present marriage would not be subject to collateral attack under the laws of the State of California. However, the administrative decision which concludes that the appellant knowingly and wilfully failed to reveal the facts of the purported marriage in effect finds the judicial determination of the Italian Court that the appellant was deceived and had no knowledge of such marriage to have no substantive, evidentiary value. In a recent decision, Justice Schauer of the California Supreme Court said:

"The public policy of this State, in the circumstances of this case, as in those considered in the *Rediker v. Rediker* (supra) requires recognition of the second marriage rather than the 'dubious attempt to resurrect the original' marriage."

Dietrich v. Dietrich, 41 Cal. 2d 497.

See also:

Watson v. Watson, 39 Cal. 2d 305, 307, 246 Pac. 2d 19.

Where, as in the instant case, the jurisdiction of the foreign court is exercised according to the rules of international law, where the parties had their domicile within its forum, the foreign decree dissolving the marriage ought to be respected by the tribunals of all other countries. In the administrative proceedings now being questioned, the Special Inquiry Officer resorted to speculation and conjecture, without considering the evidence, in reaching his conclusion that the appellant deliberately concealed the facts of the purported marriage. There is no evidence to support his conclusion.

Findings to be valid cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla. The test is whether in the individual case before the Court there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Willapoint Oysters v. Ewing, 9 Cir., 1949, 174 F. 2d 676, 691, Cert. den. 338 U.S. 860, 94 L. Ed. 527.

The administrative finding made herein was contrary to the "indisputable character of the evidence" which was offered in this matter.

Interstate Commerce Commission v. Louisville and Nashville Railroad Co., 227 U.S. 88, 91, 57 L. Ed. 431.

Compare:

Kwock Jan Fat v. White, 253 U.S. 454, 64 L. Ed. 1010;

Chin Yow v. United States, 208 U.S. 8, 52 L. Ed. 369.

The Supreme Court of the United States has held—"Where the fate of a human being is at stake, as, for example, the deportation of an alien, the presence of an essential evil purpose may not be left to conjecture." *Bridges v. Wixon*, supra.

The evidence of record does not sustain any administrative allegation that there was fraud or wilful misrepresentation on the part of the appellant at the time he sought to secure an immigration visa in order to properly reenter the United States for permanent residence. On the other hand, there is reasonable, substantial and probative evidence to support the appellant's contention that he never had any prior knowledge concerning the alleged marriage in Berlin, and such evidence stands uncontroverted in the record.

CONCLUSIONS.

Failure of the Immigration and Naturalization Service to comply with the statutory requirements of Section 242 of the Immigration and Nationality Act is a denial of procedural due process of law. It is a recognized rule that recitals in a judgment are presumed to be true and correct unless controverted by other parts of the record, and one who seeks to collaterally attack such judgment rendered by a Court of competent jurisdiction bears a heavy burden of proof—there is not a mere scintilla of evidence which meets this burden.

We do not believe that the immigration and naturalization laws of the United States contemplate in-

fiction of a penalty so severe and perpetual, as the administrative decision entered in this matter, on nothing more than inference, speculation and conjecture.

PRAYER.

WHEREFORE, appellant, Basilio Fugiani, prays that this Court make a judicial determination that he is not an alien who has sought to secure an immigration visa by fraud or wilful misrepresentation and that the matter be remanded to the defendant for further proceedings in conformity therewith.

Dated, San Francisco, California,
February 11, 1957.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH H. HERTOGS,
Attorneys for Appellant.

(Appendix A Follows.)

Appendix “A”

Appendix A

Original filed April 3, 1956.
Clerk, U. S. Dist. Court,
San Francisco.

*In the United States District Court
For the Northern District of California
Southern Division*

No. 34263

Basilio Fugiani,

Plaintiff,

vs.

Bruce G. Barber, District Director, Im-
migration and Naturalization Service,
San Francisco, California,

Defendant.

ORDER FOR JUDGMENT

Petitioner was admitted to the United States at New York as a temporary visitor on February 28, 1950 for a period to expire June 1, 1950. He promptly came to San Francisco and equally promptly married an American citizen spouse on March 29, 1950. He did not depart as required, when his visiting privilege expired.

He is, and has been since June 1, 1950, illegally in the United States and at all times subject to deportation under the Act of May 26, 1924.

While admitting his deportability, he has sought suspension of deportation on the ground of economic hardship. This was denied by the District Director of Immigration and his decision was affirmed by the Board of Immigration Appeals. The denial was principally on the basis that petitioner perjured himself in his application by denial of any previous marriage.

He petitions this Court for review (60 Stat. 243, 5 USC 1009) and prays that his case be remanded for reconsideration.

I find no merit in the petition. The hearing officer's findings are based upon testimony of the petitioner, which the officer found to be incredible. The Board of Appeals affirmed on the ground that the record justified the finding. Under all the circumstances disclosed in the record, judicial intervention is not warranted.

The petition is dismissed. Present findings and appropriate judgment.

Dated, April 3, 1956.

Louis E. Goodman,
United States District Judge.

No. 15,162

IN THE

United States Court of Appeals
For the Ninth Circuit

BASILIO FUGIANI,

Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco, California,
Appellee.

On Appeal from the United States District Court for the
Northern District of California.

APPELLEE'S BRIEF.

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FILED

APR 23 1957

PAUL P. O'BRIEN, CLERK

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No. 15,162

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BASILIO FUGIANI,

Appellant,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco, California,
Appellee.

**On Appeal from the United States District Court for the
Northern District of California.**

APPELLEE'S BRIEF.

PRELIMINARY STATEMENT.

The appellant Basilio Fugiani is a native and citizen of Italy. He entered the United States as a temporary visitor at the Port of New York on February 28, 1950, but remained in the United States for a longer time than permitted and is, therefore, deportable under the Immigration Act of 1924 on the charge contained in the warrant of arrest. The foregoing facts are admitted. The petition for review filed by appellant does not challenge the determination of deportability on the charge.

During the course of the proceedings, appellant made application for suspension of deportation and,

as an alternative form of relief, for voluntary departure under Section 19(c) of the 1917 Act (8 U.S.C. 155(c)). Appellant was found to be eligible to apply for relief under Section 19(c), but in the exercise of discretion under said Sec. 19(c), the relief sought was denied.

JURISDICTIONAL STATEMENT.

Appellant has commenced the action herein by filing a petition for review invoking jurisdiction under 5 U.S.C. 1009. His prayer for relief asks the court to declare the decision denying his application for *suspension of deportation* or, in the alternative, voluntary departure *and preexamination*, as an "arbitrary abuse of discretion" and that he "was not granted a fair and impartial determination." Appellant is admittedly a deportable alien. His petition for review does not challenge the decision of deportability. Appellant was admittedly eligible for suspension of deportation under 19(c). The petition does not claim a failure to exercise discretion but that the exercise of the discretion in the denial of the relief sought was arbitrary and capricious. Such limited review as may be within the province of the court is properly effected, short of detention, by a petition for review under 5 U.S.C. 1009, Sec. 10 of the Administrative Procedures Act.

Shaughnessy v. Pedreiro, 349 U.S. 48;

Jay v. Boyd, 351 U.S. 345;

Ceballos v. Shaughnessy, No. 71 October Term,
S.Ct. decided March 11, 1957.

QUESTION PRESENTED.

Appellant in his brief has failed to state any question raised by his specification of errors. The appellee is at a loss to propound a question in his behalf. The Summary of Issues and Legal Argument would seem to be directed to anticipation of what might happen at some unidentified time in the future.

STATUTES INVOLVED.

Section 14, Immigration Act of 1924 (8 U.S.C. 214) :

“Any alien who at any time after entering the United States is found to have . . . remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of 1917. . . .”

Section 15, Immigration Act of 1924 (8 U.S.C. 215) :

“The admission to the United States of an alien excepted from the class of immigrants . . . shall be for such time and under such conditions as may be by regulations prescribed . . . to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States. . . .”

Sec. 19(c) of the Immigration Act of 1917 (8 U.S.C. 155(c)) :

“In the case of any alien . . . who is deportable under any law of the United States and who has

proved good moral character for the preceding five years, the Attorney General may . . . (1) permit such alien to depart the United States to any country of his choice, at his own expense, in lieu of deportation, (2) suspend deportation of such alien if he . . . finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; . . .”

Regulations

8 C.F.R. 142—Preexamination of aliens within the United States (in effect prior to the Immigration and Nationality Act of 1952).

142.1. Who may apply.

“An alien who is a member of any of the following classes . . . *may*, subject to the provisions of this part, apply for the *privilege* of a preexamination. . . .”

142.2. Aliens eligible.

“(a) Admissible to Canada.

(b) Of good moral character.

(c)

(d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence.”

142.7.

“. . . preexamination will not be accorded . . . unless or until he . . . has received from the consular officer written assurance . . . that a visa will be promptly available . . .”

STATEMENT OF THE CASE.

Appellant, a native and citizen of Italy, was admitted to the United States on February 22, 1950 as a nonimmigrant (visitor), under Section 3(2) of the Immigration Act of 1924 at New York, New York. On March 28, 1950, he married a citizen of the United States. Subsequently, he appeared at the Immigration and Naturalization Service, San Francisco, where he admitted being in the United States illegally, and made application for discretionary relief under Sec. 19(c) of the 1917 Act. A warrant of arrest issued on June 25, 1951, on the charge under Secs. 14 and 15 of the 1924 Act that after admission as a visitor he had remained in the United States for a longer time than permitted. On September 23, 1952, he was accorded a deportation-expulsion hearing. The charge contained in the warrant was admitted and he was found to be a deportable alien. The privilege of suspension of deportation was denied but the privilege of voluntary departure was granted. At appellant's request, the proceedings were reopened on September 24, 1952, to permit appellant to put into the record a telegram to the effect that the American Consul General at Vancouver, Canada, had advised that a first preference visa was available to appellant. Based on said wire, the Special Inquiry Officer on October 7, 1952 amended the Order of September 23, 1952 to authorize the privilege of preexamination, said privilege to be accomplished by December 23, 1952. Several extensions of the time within which to depart under the said Order authorizing voluntary departure were granted. The last extension expired on July 20,

1953. In the meantime, appellant's wife filed a visa petition in his behalf in which appellant represented to the American Consulate General at Vancouver that he had never been previously married. (Tr. 10). Thereafter, the Immigration and Naturalization Service received information that appellant had been previously married. By Order dated July 28, 1953 (Appendices "A" and "B") the Order of September 24, 1952 granting voluntary departure and preexamination was withdrawn and the proceedings reopened. Appellant presented to the Immigration and Naturalization Service a letter from the American Consul dated November 25, 1952 (Appellant's Exhibit No. 2) stating that before action would be taken on his application it would be necessary for him to submit documentary evidence of the termination of this previous marriage. Appellant then instituted proceedings to annul said marriage. (Tr. 13).

On September 25, 1953, appellant was ordered deported from the United States. (Appendix "C".)

The Board of Immigration Appeals dismissed the appeal on October 5, 1954. (Appendix "D".)

ARGUMENT.

It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in cases of extreme abuse will courts intervene.

Hyun v. Landon, 219 F.2d 404, aff. split decision, 350 U.S. 990;

Carlson v. Landon, 342 U.S. 524, 536;

United States ex rel. Volpe v. Smith, 289 U.S. 422.

It is the conclusion of appellee that appellant's specification of errors is wholly unrelated to any issue which might be present in this case.

(1) The reasonable, substantial and probative evidence rule is drawn from Sec. 242(b) of the 1952 Immigration and Nationality Act (8 U.S.C. 1252(b)) and is related by the statute to the determination of deportability. Deportability is admitted by appellant. Discretionary relief sought is a "matter of grace."

Jay v. Boyd, 351 U.S. 345;

Hintopoulas v. Shaughnessy, 352 U.S., 25 L.W. 4201;

United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489, 491;

Wolf v. Boyd (C.A. 9) 238 F.2d 249.

(2) Appellant has made no attempt to establish that he was not given full opportunity to present his application for discretionary relief.

(3) Having exercised the discretion, judicial intervention is not warranted.

This conclusion is supported by the paragraph appearing on page 6 of appellant's brief entitled: *Summary of Issues and Legal Argument*.

"The sole question to be determined at this time is whether the appellant sought to procure a visa or other documentation by fraud or by wilfully misrepresenting a material fact, within the meaning of Section 212(a) (19) of the Immigration and Nationality Act. This issue is of vital importance, because if it is determined that such is the case appellant would thereafter be ineligible to obtain an immigration visa or reenter the United States even temporarily."

Appellant uses the phrase "sole question" with regard to the procurement of a visa by fraud within the meaning of Section 212(a)(19) of the 1952 Act, but he makes no attempt to indicate within which specification of error this "sole question" arises. Continuing on to page 7 of his brief, it would appear that the "sole question" arises out of an administrative process known as preexamination. This process was not statutory but was established by regulations in effect *prior* to the 1952 Act. (8 C.F.R. 142).

Under 8 C.F.R. 142 an alien could have had his admissibility for permanent residence determined in advance by preexamination. However, preexamination could not have been accomplished "until he (the alien) has received from the consular officer written assurance . . . that a visa will be promptly available if, upon personal examination by the Consul, he is found to be eligible for a visa . . ." (8 C.F.R. 142.7).

This appellant was unable to satisfy. (Exhibit 2) Thus he was unable to bring himself within the qualifying provisions of the regulation.

Appellant admits that he notified both the Immigration and Naturalization Service and the American Consulate General at Vancouver that he had never been previously married. (Appellant's brief p. 10). Appellant had been previously married. This fact was discovered by the Department of State and resulted in the letter of the Consulate General, Vancouver, to appellant, dated November 25, 1952. (Exh. 2)

Appellant was eligible to apply for suspension of deportation under 8 U.S.C. 155(c) and the court below so found. (Tr. 15)

In the exercise of discretion under 8 U.S.C. 155(c), the relief of suspension of deportation was denied to appellant. (Tr. 15)

The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.

United States ex rel. Kaloudis v. Shaughnessy,
180 F.2d 489, 491;

Jay v. Boyd, 351 U.S. 345.

The grant of the discretionary relief of suspension of deportation is not a matter of right, but rather is in all cases a matter of grace.

Jay v. Boyd (supra);

Hintopoulos v. Shaughnessy, 233 F.2d 705, aff.
352 U.S.

Appellee again states that appellant has raised no issue for determination on this appeal. "The Summary of Issues" refers to Sec. 212(a) (19) of the 1952 Immigration and Nationality Act and anticipates that should appellant at some time in the future seek to enter the United States he might be excluded on the ground that he had sought to procure a visa by fraud or by wilfully misrepresenting a material fact. The Special Inquiry Officer was not required to decide whether or not appellant had so attempted to obtain a visa. In his discussion of the evidence preceding the findings of fact and conclusions of law (Appendix "C") he expresses the opinion that "the record . . . clearly indicates that the (appellant) attempted to obtain an immigration visa . . . through fraud . . ." Appellant is in error in stating on page 5 of his brief the

Special Inquiry Officer directed that the "appellant be deported from the United States" because of this attempt. This statement is misleading. The findings and conclusions of the Special Inquiry Officer (Appendix "C") contain no finding or conclusion that appellant attempted to obtain a visa by fraud. In denying discretionary relief, the entire record was reviewed and the relief denied.

Appellant had represented to the American Consul that he had not been previously married, whereas in fact he had been married. The letter from the American Consul introduced as Exhibit (2) established his inability to satisfy the requirements of the regulation C.F.R. 142(1)(2)(7). Then followed the proceedings as related to the annulment of the marriage to Ellie Porg.

Upon the record as presented, discretionary relief having been denied, deportation was ordered on the admitted charge. Appellant's entire argument and his appeal is based upon an unstated postulate that there was a burden upon the Immigration and Naturalization Service to prove fraud or wilful misrepresentation. There was no such burden. On the contrary, full opportunity was afforded appellant to present such matter as might induce the exercise of discretion in his behalf. The relief sought was denied.

Chavez v. McGranery (C.A. 9), 220 F.2d 857;
Jiminez v. Barber, 235 F.2d 922.

CONCLUSION.

It is respectfully submitted that a review of the record in this case clearly shows appellant to be a deportable alien who sought discretionary relief. He was found eligible for such relief but in the exercise of the discretion, such relief was denied. The appeal should be dismissed and the judgment below affirmed.

Dated:

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendices "A", "B", "C" and "D" Follow.)



Appendices.



Appendix "A"

July 28, 1953

Memorandum for attention of Special Inquiry Officer
P. R. McLaughlin and Docket Clerk
in the Inquiry Section

Re: Basilio Fugiani
V-944377

It is noted that at the conclusion of warrant proceedings before Special Inquiry Officer Robert S. DeMoulin on September 24, 1952, the following order was entered:

"It is ordered that the respondent be permitted to depart voluntarily from the United States at his own expense within 120 days after this order.

"It is further ordered that if the respondent fails to depart voluntarily from the United States within 120 days from the date of this order or any authorized extension thereof, that he be deported from the United States pursuant to law on the charge set forth in the Warrant of Arrest.

"It is further ordered that preexamination be authorized, providing availed of prior to December 24, 1952."

In view of the fact that evidence has now been furnished to the Immigration and Naturalization Service indicating that the respondent's sworn statements as to his marital situation at the time of his application for discretionary relief granted at the above order were not in accordance with the true facts in his case and created a presumption at least that he may not

have been in all respects eligible for such relief, it appears that further proceedings are necessary to determine the respondent's eligibility for discretionary relief.

Since the special inquiry officer previously assigned to hold the hearing in this matter is not now immediately available, the case will be and is hereby re-assigned to Special Inquiry Officer P. R. McLaughlin for such proceedings as may be required for the appropriate disposition of the case.

L. E. Gowen,
Acting Chief Inquiry Section

Appendix "B"

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

San Francisco, California

File: V-944377

In re: Basilio Fugiani

In Deportation Proceedings

In Behalf of Respondent:

Z. B. Jackson, Attorney at Law

580 Washington Street

San Francisco, California

Charges:

Warrant: Act of 1924—Remained longer—visitor

Lodged: None.

ORDER TO REOPEN

Proceedings in the case of the above-mentioned alien, originally assigned to Special Inquiry Officer Robert S. DeMoulin and now requiring further attention and possible rehearing and having been assigned to me for appropriate action in view of the absence of Special Inquiry Officer DeMoulin, the following order is hereby entered:

Order: It is ordered that the order entered on September 24, 1952, granting the alien the privilege of voluntary departure and the further privilege of pre-examination with an alternative order of deportation be and the same is hereby withdrawn;

It is further ordered that the proceedings be reopened in order to determine the respondent's eligibility for discretionary relief in view of new and important evidence now contained in his official file.

/s/ P. R. McLaughlin

P. R. McLaughlin

Special Inquiry Officer

Appendix "C"

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

San Francisco, California

Sept 25, 1953

File: V-944377

In re: Basilio Fugiani

In Deportation Proceedings

In Behalf of Respondent:

Z. B. Jackson, Attorney at Law

580 Washington Street

San Francisco, California

Charges:

Warrant: Act of 1924—Remained longer—visitor

Lodged: None.

Application: Suspension of deportation and voluntary departure in the alternative.

Detention Status: Released on conditional parole.

Warrant of arrest served: June 25, 1951.

Discussion: This record relates to a 28 year old married male, a native and citizen of Italy who last entered the United States at the port of New York as a passenger on the motor ship "Sobieski" at which time he was admitted by a Board of Special Inquiry as a temporary visitor under bond to June 1, 1950. That entry has been verified. The period of admission was not extended and the respondent has remained in the United States since June 1, 1950 without authority. He is therefore deportable under the

Immigration Act of 1924 on the charge stated in the warrant of arrest which is fully sustained.

This matter first came up for hearing under the warrant of arrest on Sept. 23, 1952 at which time the respondent applied for suspension of deportation with an alternative application for voluntary departure in the event he was found ineligible for the maximum relief requested. As evidence of his eligibility for discretionary relief, the respondent presented Immigration Form I 256A which was executed by him before the Deportation Examiner presiding at this hearing on Sep. 23, 1952 (Exhibit 3).

The respondent executed the jurat at the end of Exhibit 3 under oath that the contents of the application were true to the best of his knowledge and belief including certain corrections marked 1 to 6 were made by him or at his request. In this application form the respondent testified among other things that his deportation would result in serious economic detriment to his United States citizen spouse to whom he was married in San Francisco on March 28, 1950.

He also testified that he had not been previously married. At the conclusion of the proceedings on Sept. 23, 1952, the Hearing Officer found the respondent eligible solely for voluntary departure and entered an order granting such relief with an alternative order of deportation. On the following day, the proceedings were reopened by the Hearing Officer on his own motion at which time the respondent advised that he had just received information from the Amer-

ican Consul in Vancouver that he might readily obtain an immigration visa at that Consulate, and in addition to the relief already granted applied for pre-examination. At the conclusion of that proceeding, the Hearing Officer found the alien deportable on the charge contained in the warrant of arrest and entered an order granting voluntary departure together with the additional privilege of preexamination with an alternative order of deportation. The respondent was formally advised as to the authorization for preexamination on Oct. 7, 1952 and advised that such authorization would terminate on Dec. 23, 1952. He received several extensions of the time within which he was to depart under the order granting voluntary departure; the last of which expired on July 20, 1953 with notice that that was the final extension and no further time would be granted. In the meantime, the respondent's wife filed a visa petition in his behalf which was approved and later found its way to the American Consul at Vancouver in the usual course of events. Under date of June 23, 1953, this office received a communication from the Central Office of the Immigration and Naturalization Service containing information that this respondent had been previously married and that he had presented no evidence to the American Consulate in Vancouver that his prior marriage had been terminated. The respondent admits having received a letter from the United States Consul General at Vancouver, B.C., Canada dated November 25, 1952 through his advisor, Mr. J. S. Forte, 57 Columbus Avenue, San Francisco 11, California which is quoted in part as follows:

“In further reference to the case of Mr. Fugiani, it is noted that in his preliminary application he stated that he has not been married previously; and in her petition for her husband’s preference status, Mrs. Ida Maria Artigiani Fugiani also stated that her husband has not been previously married. Information on file at this office indicates that Mr. Fugiani was previously married to a German girl while he was a prisoner of war in Germany. Before the Consulate General could take further action in Mr. Fugiani’s case, it will be necessary for him to submit documentary evidence of the termination of this previous marriage.”

A copy of that communication was forwarded to this office. The respondent then through Counsel requested additional time within which to depart in order to enable him to complete an annulment action.

In view of the above developments, the case was reassigned to a Special Inquiry Officer for appropriate attention and was thereafter ordered reopened for the taking of additional evidence as to the respondent’s eligibility for discretionary relief.

At the reopened proceedings the respondent presented a decree of annulment entered in the Civil and Penal Tribunal of Ancona, Italy on the 10th day of July, 1953 showing the termination of his marriage to one Elly Martha Porg residing in Berlin—Kochkausstrasse N. 33 was contracted on Sept. 4, 1945 in the City of Berlin. In the action for annulment, the respondent alleged through Counsel that after having escaped from a prisoner of war camp in or near Ber-

lin, Germany in 1945, he was given shelter by the family of Elly Porg for approximately 15 days. And, on that occasion, he was asked and he did affix his signature in the presence of third parties on a sheet of paper for the purpose, as he was told, to let the Porg family obtain food rations and clothing since they were his hosts and went on to state that he never intended to contract matrimony with the said Elly and that the marriage had never been consummated. It is also noted that in the decree of annulment that mention is made of the fact that Elly Porg appeared through her constituted attorney which is followed by another statement, "Being she was present however in person" at the proceedings and is alleged to have been questioned.

The record in this case clearly indicates that the respondent attempted to obtain an immigration visa for admission to this country through fraud and that he carefully concealed from the authorities that he had been previously married. His statement to the effect that he went through a marriage ceremony and signed papers in Berlin in the belief that the proceedings related only to rationing is incredible. It is indicated that he was in company of several other escaped Italian war prisoners who also signed papers concerning rationing and they certainly did not all go through the same procedure. It might be observed here that Germany for many years has maintained excellent records of vital statistics, and it is inconceivable that an alien however unfamiliar with the German language in possession of all of his faculties could

actually go through a marriage ceremony without being conscious of the fact. It appears that he and the other Italian prisoners were able to make themselves understood by the Porg family who evidently spoke only German and in the event they were able to explain to this respondent that they needed his signature for additional food and clothing, it naturally follows that he should have been able to understand that a marriage was involved. I believe that this respondent was fully aware of his prior marriage and deliberately withheld such information from the authorities of this country even to the extent of committing perjury in his application for discretionary relief. This respondent has shown an utter disregard for the Immigration laws of this country. After being admitted under bond for a short period of time and being denied an extension of stay, he deliberately violated the status of his admission and the bond was breached. It is noted that the date of his marriage to the American citizen was contracted exactly one month after the date of his admission. The conclusion is justified that he was never a bona fide visitor and that his intentions in the first instance were to remain in the United States at all costs. In view of all the facts and circumstances, I can only conclude that the respondent is wholly ineligible for any type of discretionary relief and should be deported and shall so order.

FINDINGS OF FACT:

Upon the basis of all the evidence presented, it is found:

- (1) That the respondent is an alien, a native and citizen of Italy;
- (2) That the respondent last entered the United States on February 22, 1950 at New York, New York as a passenger on the MS Sobiesky at which time he was admitted as a visitor to June 1, 1950;
- (3) That the period of admission was not extended;
- (4) That the respondent has remained in the United States for longer than the period for which he was admitted.

CONCLUSION OF LAW:

Upon the basis of the foregoing findings of fact, it is concluded:

- (1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, the respondent is subject to deportation on the ground that after admission as a visitor, he has remained in the United States for a longer period than permitted under said Act or regulations made thereunder.

ORDER: It is ordered that the alien be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

/s/ P. R. McLaughlin
P. R. McLaughlin
Special Inquiry Officer

Appendix "D"

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

OCT 5—1954

File: V-944377—San Francisco

In re: Basilio Fugiani

In Deportation Proceedings

In Behalf of Respondent:

Z. B. Jackson, Esquire
580 Washington Street
San Francisco, California
(Brief filed)

CHARGES:

Warrant: Act of 1924—Remained Longer—Visitor
Lodged: None

APPLICATION: Voluntary departure and preexamination

DETENTION STATUS: Released on conditional parole

The case comes forward on appeal from the order of a special inquiry officer dated September 25, 1953 directing that the respondent be deported on the charge stated in the warrant of arrest.

The record relates to a native and citizen of Italy, 39 years old, male, who last entered the United States at the port of New York on February 28, 1950 and was admitted as a temporary visitor to June 1, 1950. It is conceded that he is subject to deportation on the charge stated in the warrant of arrest. The only issue before us is the matter of discretionary relief.

At the hearing held September 23, 1952, the respondent applied for suspension of deportation and in the alternative voluntary departure. In connection therewith, he executed Immigration Form I-265A executed before the deportation examiner then presiding on September 23, 1952 under oath. In this application form, the respondent related that his deportation would result in serious economic detriment to his citizen wife whom he married in San Francisco on March 28, 1950. He testified that he had not been previously married. At the conclusion of the proceedings, the respondent under order of September 24, 1952 was granted the discretionary relief of voluntary departure in lieu of deportation together with preexamination. A visa petition filed by the wife on behalf of the respondent was approved, and such approval was in due course transmitted to the American Consulate, Vancouver, B. C. The Consul under date of November 25, 1952 informed the respondent through his representative that whereas the preliminary application of the respondent stated that he had not been previously married, that the respondent was previously married to a German girl while a prisoner of war in Germany. In view of this information, the proceedings were ordered reopened.

At the reopened proceeding, the respondent presented a decree of annulment entered in the Civil and Penal Tribunal of Ancona, Italy on July 10, 1953 showing the termination of his marriage to one Elly Martha Porg, such marriage having been contracted on September 4, 1945 in the City of Berlin, Germany. It is the contention of the respondent that he was

tricked into marriage by the girl and her parents. This was done after the respondent had escaped from the prisoner of war camp in Germany in 1945, after which he was given shelter by the family of Elly Porg for approximately 15 days; that during this time he affixed his signature in the presence of a third party on a sheet of paper for the ostensible purpose of permitting the Porg family to obtain food rations and clothing since they were his host. He denied that he intended to contract matrimony and stated that the marriage had never been consummated.

The special inquiry officer who heard the testimony of the respondent and had an opportunity to observe his behaviour and demeanor has characterized the explanation given by the respondent in regard to his marriage to Elly Porg as incredible. He has concluded that the respondent was fully aware of his prior marriage and deliberately withheld such information from the immigration authorities for the purpose of obtaining discretionary relief. Upon consideration of the entire record and taking into account the arguments advanced by counsel in his brief, we come to the conclusion that the decision should not be disturbed. Accordingly, the appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

/s/ Thos. G. Finucane
Chairman

No. 15189 ✓

United States
Court of Appeals
for the Ninth Circuit

AMERICAN CHEMICAL PAINT COMPANY,
a Corporation,

Appellant,

vs.

THOMPSON CHEMICAL CORPORATION, a
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

OCT - 2 1956



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Appellee:

WM. DOUGLAS SELLERS,
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Pasadena 1, California.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 17987-C

AMERICAN CHEMICAL PAINT COMPANY,
a Corporation,

Plaintiff,

vs.

THOMPSON CHEMICAL CORPORATION, a
Corporation,

Defendant.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT No.
2,258,292

Plaintiff, complaining of defendant, alleges as
follows:

I. Plaintiff

Plaintiff, American Chemical Paint Company, is
a corporation existing under and by virtue of the
laws of the State of Delaware, having a regular and
established place of business in Ambler, Pennsylv-
ania.

II. Defendant

Upon information and belief, defendant, Thomp-
son Chemical Corporation, formerly known as
Thompson Horticultural Chemical Corp., is a corpo-
ration existing under and by virtue of the laws of
the State of California, having a place of business
at 3600 Monon Street, Los Angeles 27, California.

III. Jurisdiction

1. This action arises under the Patent Statutes of the United [2*] States, and this Court has jurisdiction thereof.

2. Upon information and belief, the acts of infringement hereof here and are being committed in the Southern District of California, and elsewhere in the United States.

IV. Title to Patent

On October 7, 1941, United States Letters Patent No. 2,258,292 were duly and legally issued to plaintiff, as the assignee by mesne assignments of Franklin D. Jones, for an invention in "Art of Regulating the Growth of Plants," and since that date, plaintiff has been, and still is, the owner of said Letters Patent.

A printed copy of said Letters Patent No. 2,258,292 is hereunto attached as Exhibit A and made a part hereof.

V. Infringement

Defendant, within the last six (6) years and subsequent to the issuance of said United States Letters Patent, has been, and still is, infringing said Letters Patent by manufacturing and selling a composition of matter embodying the patented invention within the Southern District of California,

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Central Division, and elsewhere within the United States.

VI. Notice

1. Plaintiff has given written notice to defendant of its infringement of said United States Letters Patent.

2. Ever since plaintiff has marketed compositions of matter incorporating the claimed subject matter of said Letters Patent, which is for at least the past ten years, plaintiff has placed the required statutory notice on the labels of all of its packages and containers.

VII. Damages

Defendant has derived unlawful gains and profits from such infringement which plaintiff would otherwise have received but for such infringement, and plaintiff has thereby been caused irreparable damage.

Wherefore, plaintiff prays for judgment for:

(a) Preliminary and final injunction against further infringement by defendant, and those controlled by defendant, of United States Letters [3] Patent No. 2,258,292.

(b) An accounting for profits and damages, tripled because of the deliberate, willful and flagrant nature of defendant's acts of infringement.

(c) An assessment of costs and reasonable attorneys' fees against defendant.

Dated: At Los Angeles, California, this 21st day of March, 1955.

FLAM and FLAM,
JOHN FLAM,
FREDERICK FLAM,

By /s/ JOHN FLAM;

CAESAR & RIVISE,
A. D. CAESAR,
MAX R. MILLMAN,

By /s/ A. D. CAESAR,
Attorneys for Plaintiff.

[Endorsed]: Filed March 21, 1955. [4]

[Title of District Court and Cause.]

No. 17987-C

FIRST AMENDED ANSWER OF THOMPSON
CHEMICALS CORPORATION

Comes now the defendant Thompson Chemicals Corporation, called Thompson Chemical Corporation in the complaint, and under the provisions of FRCP 15(a) and in answer to the complaint, alleges, avers and denies as follows:

I. Plaintiff

Answering paragraph I of the complaint, this answering defendant alleges that it has no knowl-

edge or information sufficient to enable it to form a belief as to the truth of the allegations thereof.

II. Defendant

Answering paragraph II of the complaint, this answering [7] defendant admits the allegations thereof.

III. Jurisdiction

Answering paragraph III of the complaint, this answering defendant denies that it has committed acts of infringement in the Southern District of California or anywhere else in the United States but admits that if an action exists it arises under the patent statutes of the United States.

IV. Title to Patent

Answering paragraph IV of the complaint, this answering defendant admits that United States Letters Patent 2,258,292 was issued on October 7, 1941, to American Chemical Paint Company, admits that a printed copy of said Letters Patent 2,258,292 was attached as Exhibit A to the complaint, and alleges that it has no knowledge or information sufficient to enable it to form a belief as to the truth of the remaining allegations of the paragraph.

V. Infringement

Answering paragraph V of the complaint, this answering defendant denies each and every allegation thereof.

VI. Notice

Answering paragraph VI of the complaint, this answering defendant admits that it has received written notice from the plaintiff alleging infringement of said United States Letters Patent, and alleges that it has no knowledge or information sufficient to enable it to form a belief as to the truth of the remaining allegations of the paragraph. [8]

VII. Damages

Answering paragraph VII of the complaint, this answering defendant denies each and every allegation thereof.

Further answering plaintiff's complaint with respect to the cause of action for patent infringement alleged in paragraphs I through VII thereof, and for separate, alternate, and further defenses thereto, this answering defendant alleges as follows:

Second Defense

Non-Infringement

For a further and separate defense, this answering defendant alleges that it has not infringed pretended Letters Patent 2,258,292, or any claim or claims thereof.

Third Defense

Invalidity for Non-Compliance With 35 U.S.C. 101

That the alleged invention or discovery claimed in the pretended Letters Patent 2,258,292 was not

patentable to the alleged inventor named therein, under the provisions of 35 U.S.C. 101; therefore, such patent is, and all of the claims thereof are, invalid and void.

Fourth Defense

Invalidity for Lack of Novelty

That prior to any supposed invention or discovery by Franklin D. Jones, the subject matter alleged to be patented by the said pretended Letters Patent 2,258,292, and particularly that which is described in the pretended claims thereof and all material and substantial parts thereof, had been patented or described in certain printed publications and/or Letters Patent in this and [9] foreign countries, the Letters Patent, the numbers thereof, the names of the patentees thereof, and the exact identification of said printed publications being at this time unknown to this answering defendant who prays leave to plead the same after diligent search therefor by amendment to this answer when they are ascertained.

Fifth Defense

Invalidity by Reason of Prior Publication

That prior to any supposed invention or discovery by Franklin D. Jones, the subject matter alleged to be patented by the said pretended Letters Patent 2,258,292, and particularly that which is described in the pretended claims thereof and all material and substantial parts thereof, had been patented or described in a printed publication in

this or a foreign country, or in public use or on sale in this country, more than two years prior to December 23, 1938, the names of the patentees, dates of the Letters Patent or publications, and the exact date of public use or sale in this country being at this time unknown to this answering defendant, who prays leave to amend and plead the same after diligent search therefor by amendment to this answer when they are ascertained.

Sixth Defense

Invalidity for Lack of Invention

That the alleged invention or discovery of the pretended Letters Patent 2,258,292 as it existed at the date of the alleged invention did not involve invention but merely consisted of the result of the exercise of ordinary skill present in those skilled in the art and was not the result of exercise of the inventive faculty, and did not involve anything more than the exercise of ordinary intelligence in view of the state of the art existing [10] at the time of and prior to said alleged invention or discovery, the state of the art including patents and publications for which this answering defendant is diligently seeking, leave and permission of this Honorable Court being requested to set them forth herein by amendment when they are ascertained.

Seventh Defense

Invalidity for Prior Knowledge

That prior to any supposed invention or discovery by Franklin D. Jones, that which is alleged to be

patented by pretended Letters Patent 2,258,292, and particularly that which is described and claimed therein, and all material and substantial parts thereof, had been know to, or used by, certain other persons in this country whose names and places of residence this answering defendant has not fully learned, and for which this answering defendant is diligently searching, and which it prays leave and permission to add to this answer by amendment when ascertained.

Eighth Defense

Invalidity for Prior Invention

That Franklin D. Jones was not the original or first inventor of the subject matter alleged to be patented in pretended Letters Patent 2,258,292, and particularly that which is described and claimed therein, and all material and substantial parts thereof, but on the contrary, the claimed subject matter had, prior to the alleged invention or discovery thereof by said Franklin D. Jones, been discovered (if there be any patentable invention) by others, the names and places of residence of which this answering defendant has not fully learned, and for which this defendant is diligently **searching**, and prays leave and permission to add to this answer by amendment when ascertained. [11]

Ninth Defense

File Wrapper Estoppel

That while the application for pretended Letters Patent 2,258,292 was pending in the United States

Patent Office, the applicant therefore so limited and confined the claims of said application under the requirement of the Commissioner of Patents, or otherwise, that plaintiff cannot now seek or obtain the construction of the claims in said Letters Patent sufficiently broad as to cover any composition made or sold or any method used by this answering defendant.

Tenth Defense

Patentee's Specification Deceptive

That pretended Letters Patent, 2,258,292 were and are invalid because for the purpose of deceiving the public the description and specification filed by the said Franklin D. Jones in the United States Patent Office were made to contain less than the whole truth relevant to his alleged invention.

Eleventh Defense

Patentee's Specification Unclear

That pretended Letters Patent 2,258,292 were and are invalid in that the alleged invention thereof was not described in such full, clear, concise and exact terms as to enable anyone skilled in the art to practice the alleged invention.

Wherefore, this defendant prays for judgment against the plaintiff herein, as follows:

1. That the complaint herein be dismissed;
2. That United States Letters Patent 2,258,292, and each and every claim thereof, be declared not infringed by any act [12] of this defendant;

3. That United States Letters Patent 2,258,292, and each and every claim thereof, be declared and adjudged invalid and void;

4. That this defendant recover from plaintiff the costs herein and reasonable attorneys' fees; and

5. That this defendant be granted such other and further relief as may be proper.

Dated at Pasadena, California, this 16th day of June, 1955.

GRAINGER, CARVER AND
GRAINGER, and
WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 17, 1955. [13]

[Title of District Court and Cause.]

No. 17987-PH

NOTICE OF MOTION AND MOTION
TO ENJOIN PLAINTIFF

To: Flam & Flam, Attorneys for Plaintiff, 2978
Wilshire Boulevard, Los Angeles 5, California.

Please Take Notice that upon the annexed affidavit of Tellef Senum, vice-president of defendant

Thompson Chemicals Corporation, and exhibits annexed thereto, the undersigned will move this Honorable Court in the Courtroom of Judge Hall, Post Office & Courthouse Building, 312 North Spring Street, Los Angeles, California, on the 14th day of May, 1956, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, for an order staying the plaintiff and its attorneys from bringing any further actions against this defendant or any of its customers based upon [15] the making and/or selling of the subject matter involved in the present action and which is alleged to infringe United States Letters Patent 2,258,292, until entry of judgment or other final disposition of the above-entitled cause, upon the grounds that the issues involved in the alleged infringement by defendant's customers of the product which it makes and sells can be fully litigated in the above-entitled cause which is already commenced.

Dated: April 24, 1956.

GRAINGER, CARVER AND
GRAINGER,
WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant. [16]

[Title of District Court and Cause.]

No. 17987-PH

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Tellef Senum, being first duly sworn, does depose and say as follows:

That, he is vice-president of the defendant Thompson Chemicals Corporation in the above-identified action; and

That, the plaintiff American Chemical Paint Company on February 9, 1956, filed in the United States District Court for the Eastern District of Washington, Southern Division, Civil Action No. 1079 identified as American Chemical Paint Company vs. Yakima Farmers Supply Co.; and [17]

That, on March 1, 1956, the plaintiff American Chemical Paint Company, filed in the United States District Court for the Eastern District of Washington, Northern Division, Civil Action No. 1359 identified as American Chemical Paint Company vs. H. R. Spinner Company, et al.; and

That, copies of the complaints filed in said actions are attached hereto as Exhibits 1 and 2; and

That, Yakima Farmers Supply Co. and H. R. Spinner Company are customers of the defendant Thompson Chemicals Corporation herein and the issues tendered in said actions are identical to those found in the present case as is evidenced by a comparison of the complaints in those actions, Ex-

hibits 1 and 2, with the plaintiff's complaint on file herein; and

That, defendant Thompson Chemicals Corporation herein is the manufacturer of the product ANA-Amide sold by Yakima Farmers Supply Co. and H. R. Spinner Company and has intervened in those actions to protect its customers; and

That, the defendant herein, basing its belief upon the action of the plaintiff in filing said unnecessary actions referred to, judges and believes that additional actions may be filed against other customers in other parts of the country primarily for the purpose of harassing defendant and injuring its business and its reputation with its customers; and

That, the defendant Thompson Chemicals Corporation is the manufacturer of the product sold by its customers and the question of infringement set forth in the present suit is common to the question of infringement of all the customers and the defendant admits primary responsibility therefor; and

It is believed that the reason for bringing any additional suits would be primarily for the purpose of harassing the defendant herein and for the purpose of putting it to unnecessary expense in defending a multiplicity of actions. [18]

Further affiant saith not.

/s/ TELLEF SENUM.

Subscribed and sworn to before me this 23rd day of April, 1956.

[Seal] /s/ NEIL M. SMITH,

Notary Public in and for Said
County and State.

My Commission Expires May 23, 1958. [19]

EXHIBIT No. 1

In the United States District Court, Eastern
District of Washington, Southern Division

Civil Action No. 1079

AMERICAN CHEMICAL PAINT COMPANY, a
Corporation,

Plaintiff,

vs.

YAKIMA FARMERS SUPPLY CO., a Corpora-
tion,

Defendant.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT No.
2,258,292

Plaintiff, complaining of defendant, alleges as
follows:

I. Plaintiff

Plaintiff, American Chemical Paint Company, is
a corporation existing under and by virtue of the

laws of the State of Delaware, having a regular and established place of business in Ambler, Pennsylvania.

II. Defendant

Upon information and belief, defendant, Yakima Farmers Supply Co., is a corporation of the State of Washington having an office and regular place of business at 10 East Washington Avenue, P. O. Box 1494, Yakima County, Yakima [20] Washington.

III. Jurisdiction

1. This action arises under the Patent Laws of the United States, and this Court has jurisdiction thereof.

2. Upon information and belief, the acts of infringement hereof were and are being committed in the Eastern District of Washington, and elsewhere in the United States.

IV. Title to Patent

On October 7, 1941, United States Letters Patent No. 2,258,292 were duly and legally issued to plaintiff, as the assignee by mesne assignments of Franklin D. Jones, for an invention in "Art of Regulating the Growth of Plants," and since that date, plaintiff has been, and still is, the owner of said Letters Patent.

A printed copy of said Letters Patent No. 2,258,292 is hereunto attached as Exhibit A and made a part hereof.

V. Infringement

The defendant, within the last six (6) years and subsequent to the issuance of said United States Letters Patent No. 2,258,292, has been, and still is, infringing said Letters Patent by making, using and/or selling a composition of matter embodying the patented invention within the Eastern District of Washington, Southern Division, and elsewhere within the United States.

VI. Notice

Ever since plaintiff has marketed compositions of matter incorporating the claimed subject matter of said Letters Patent, which is for at least the past ten years, plaintiff has placed the required statutory notice on the labels of all of its packages and containers.

VII. Damages

Defendant has derived unlawful gains and profits from such infringement which plaintiff would otherwise have received but for such infringement, and plaintiff has thereby been caused irreparable damage. [21]

Wherefore, plaintiff prays for judgment for:

(a) Preliminary and final injunction against further infringement by defendant, and those controlled by defendant, of United States Letters Patent No. 2,258,292.

(b) An accounting for profits and damages, tripled because of the deliberate, willful and flagrant nature of defendant's acts of infringement.

(c) An assessment of costs and reasonable attorneys' fees against defendant.

Dated: At Yakima, Washington, this 9th day of February, 1956.

BROWN, HOVIS & COCKRILL,
NAT. U. BROWN,
JAMES B. HOVIS,
LEONARD M. COCKRILL,

By /s/ LEONARD M. COCKRILL;

CAESAR & RIVISE,
A. D. CAESAR,
MAX R. MILLMAN,

/s/ MAX R. MILLMAN,

By /s/ A. D. CAESAR,

Attorneys for Plaintiff. [22]

[Exhibit A of the Complaint Comprised a Printed Copy of the Patent to Franklin D. Jones, No. 2,258,292.] [23]

EXHIBIT No. 2

In the United States District Court, Eastern
District of Washington, Northern Division
Civil Action No. 1359

AMERICAN CHEMICAL PAINT COMPANY, a
Corporation,

Plaintiff,

vs.

H. R. SPINNER COMPANY, a Partnership, and
R. K. ARROWSMITH, R. G. SHILDMYER
and A. R. ROLFS,

Defendants.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT No.
2,258,292

Plaintiff, complaining of defendants, alleges as
follows:

I. Plaintiff

Plaintiff, American Chemical Paint Company, is
a corporation existing under and by virtue of the
laws of the State of Delaware, having a regular and
established place of business in Ambler, Pennsylvan-
ia.

II. Defendants

Upon information and belief, defendant, H. R.
Spinner Company, is a partnership having an office
and a regular place of business at 1550 S. Wenat-
chee, Chelan County, Washington, [24] and the de-
fendants, R. K. Arrowsmith, R. G. Shildmyer and
A. R. Rolfs are partners in said H. R. Spinner
Company.

III. Jurisdiction

1. This action arises under the Patent Statutes of the United States, and this Court has jurisdiction thereof.

2. Upon information and belief, the acts of infringement hereof were and are being committed in the Eastern District of Washington, and elsewhere in the United States.

IV. Title to Patent

On October 7, 1941, United States Letters Patent No. 2,258,292 were duly and legally issued to plaintiff, as the assignee by mesne assignments of Franklin D. Jones, for an invention in "Art of Regulating the Growth of Plants," and since that date, plaintiff has been, and still is, the owner of said Letters Patent.

A printed copy of said Letters Patent No. 2,258,292 is hereunto attached as Exhibit A and made a part hereof.

V. Infringement

The defendants, and each of them, within the last six (6) years and subsequent to the issuance of said United States Letters Patent No. 2,258,292, have been, and still are, infringing said Letters Patent by making using and/or selling a composition of matter embodying the patented invention within the Eastern District of Washington, Northern Division, and elsewhere within the United States.

VI. Notice

Ever since plaintiff has marketed compositions of matter incorporating the claimed subject matter

of said Letters Patent, which is for at least the past ten years, plaintiff has placed the required statutory notice on the labels of all of its packages and containers. [25]

VII. Damages

Defendants, and each of them, have derived unlawful gains and profits from such infringement which plaintiff would otherwise have received but for such infringement, and plaintiff has thereby been caused irreparable damage.

Wherefore, plaintiff prays for judgment for:

(a) Preliminary and final injunction against further infringement by defendants, and each of them, and those controlled by defendants, of United States Letters Patent No. 2,258,292.

(b) An accounting for profits and damages, tripled because of the deliberate, willful and flagrant nature of defendants' acts of infringement.

(c) An assessment of costs and reasonable attorneys' fees against defendants.

Dated: At Spokane, Washington, this day of February, 1956.

RANDALL, DANSKIN &
LUNDIN,
C. D. RANDALL,
F. B. DANSKIN,
A. A. LUNDIN,

By /s/ C. D. RANDALL;

CAESAR & RIVISE,
A. D. CAESAR,
MAX R. MILLMAN,

/s/ A. D. CAESAR,

By /s/ MAX R. MILLMAN,
Attorneys for Plaintiff. [26]

[Exhibit A of the Complaint Comprised a Printed Copy of the Patent to Franklin D. Jones, No. 2,-258,292.]

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 25, 1956. [27]

[Title of District Court and Cause.]

No. 17987-PH

MEMORANDUM AND POINTS AND AUTHOR-
ITIES IN SUPPORT OF MOTION TO
ENJOIN PLAINTIFF

To the Honorable, the Judges of the United States
District Court in and for the Southern District
of California, Central Division

The defendant Thompson Chemicals Corporation has moved this Honorable Court to enjoin the plaintiff American Chemical Paint Company from filing and prosecuting additional infringement actions against the various customers of this defendant

scattered throughout the country. This motion is believed to be well founded in fact and in law and that by granting it no hardship will be worked upon the plaintiff but that instead the defendant and its customers will be saved needless expense and embarrassment. [29]

The present action is based upon the alleged infringement of the plaintiff's patent 2,258,292. The issue of infringement by the product made and sold by the defendant is clearly present in the present action as is the question of the validity of the patent.

The defendant herein admits its primary liability for the product and respectfully contends that the issue is here before the Court and will be here adjudicated and if such liability exists will here be met.

In the case *The Crosley Corporation v. Hazeltine Corporation*, CCA 3rd, 1941, 122 F.2d 925, 51 USPQ 1, the lower court had before it squarely the proposition here presented and refused the injunction requested to enjoin the prosecution of some nine suits. Upon appeal the Court of Appeals ruled that it was an abuse of discretion to refuse to grant the injunction and quoted with approval the words of Chief Justice Marshall in *Smith v. McIver*, 22 U.S. (9 Wheat.) 532, 535, and as follows:

“In all cases of concurrent jurisdiction, the court which first has possession of a subject must decide it.”

In the recent case decided in the District Court in New Jersey entitled *The Cold Metal Products Company v. Crucible Steel Company of America*, District Court, D. New Jersey, 1954, 104 USPQ 46, Judge Modarelli presiding, ruled that the second filed action should be enjoined, saying:

“In granting defendant’s motions, such needless multiplicity will be avoided, there will be the ‘conservation of judicial resources and comprehensive disposition of litigation’ suggested by the Supreme Court in *Kerotest Mfg. Co.*, at p. 183, 92 USPQ at 2.”

It is believed that the ends of justice will be served and needless harassment of this moving defendant and its customers will be avoided by the granting of this motion. [30]

Such action is respectfully urged.

Dated: April 24, 1956.

Respectfully submitted,

GRAINGER, CARVER AND
GRAINGER,
WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant.

Points and Authorities

It Lies Within the Discretion of the Court and
Is Proper to Restrain the Prosecution of Later

Actions Directed to the Same Issues as the First Filed Action.

The Crosley Corporation v. Hazeltine Corporation (CCA 3, 1941) 122 F.2d 925, 51 USPQ 1;

The Cold Metal Products Company v. Crucible Steel Company of America (D.C. D. N.J., 1954) 104 USPQ 46.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 25, 1956. [31]

[Title of District Court and Cause.]

No. 17987-PH

OBJECTIONS TO MOTION TO ENJOIN
PLAINTIFF AND ANSWERING MEMO-
RANDUM

To the Honorable, the Judges of the United States
District Court in and for the Southern District
of California, Central Division

Plaintiff hereby objects to defendant's motion to enjoin plaintiff from filing and prosecuting additional infringement actions against various customers of the defendant on the grounds that said motion has no foundation whatever in fact and law. [33]

Under the patent laws all those who make, use

and/or sell an invention covered by a patent are infringers. This includes wholesalers and dealers as well as manufacturers.

A patent owner is therefore perfectly within his rights to sue dealers who purchase and resell the accused product.

The resale of defendant's infringing product by defendant's dealers to farmers, either as such or after possible dilution, is an act of infringement separate and distinct from that of the defendant. The extent of resale is a factual matter separate and distinct from the fact of purchase of the accused product from the defendant.

Notwithstanding the fact that a suit against a manufacturer and a suit against its dealers may involve the same patent, the facts relating to the acts of infringement and the extent of their damage are different in both suits. Moreover, a dealer is a legal entity separate and distinct from the manufacturer as regards the acts of infringement.

It is therefore not true, as contended by the defendant, that the issues involved in the infringement by defendant's customers can be fully litigated in the instant cause.

Moreover, defendant's cry that it is being harassed and will be harassed by suits brought against its customers is untrue and without merit. It is the defendant who has wilfully and deliberately infringed plaintiff's patent and it is this basic tortious act

which has caused damage to the plaintiff. If anyone has been wronged, it is the plaintiff.

In addition, defendant's motion has no foundation in law because it requests the Court to exercise a power which it does not possess.

Defendant's motion is not to stay the further prosecution of an existing suit against defendant's wholesale customers, but rather to prevent the plaintiff from instituting any future suits. Defendant's action is "anticipatory" and finds no basis whatever in statute or case law. [34]

* * *

Los Angeles, California, May 3, 1956.

FLAM & FLAM, and
CAESAR & RIVISE,

By /s/ JOHN FLAM,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 4, 1956. [36]

[Title of District Court and Cause.]

No. 17,987-PH

OBJECTIONS TO PROPOSED ORDER EN-
JOINING PLAINTIFF FROM COMMENC-
ING AND FURTHER PROSECUTING
CERTAIN ACTIONS

The Order is objected to on the grounds set forth in a letter addressed to William Douglas

Sellers, Esq., dated May 21, 1956, signed by the plaintiff's local attorney. A copy of this letter is presumably on file.

To summarize, the Order should state that an injunction may issue enjoining the plaintiff from certain acts, but conditioned upon the posting of a bond by the defendant. Plaintiff's local counsel is under the impression that this was the effect of the Court's ruling.

The Order, as proposed by the defendant, ignores the provisions of Rule 65(c) F.R.C.P. There it is stated that no preliminary injunction shall issue except upon the giving of security by the [38] applicant.

Plaintiff's local counsel understood that the amount of the bond was to be fixed upon a showing by the plaintiff regarding the question. Unfortunately, local counsel has not received anything from Eastern counsel in the nature of an affidavit to assist the Court in fixing the amount of the bond. However, on May 22, 1956, a letter was received from Richmond, Virginia signed by Mr. Caesar, Eastern counsel for plaintiff, and reading as follows:

"Your letter of May 14, 1956, has been sent to me here where I am listening in on a case.

"I shall probably be here at least all of this week and the first three days of next week.

"I shall answer your letter as soon as I shall return to my desk."

In view of these circumstances, it is respectfully requested that the Order be amended to state that an injunction may issue upon the posting of a bond, the amount of which is to be determined by the Court upon evidence to be produced on behalf of plaintiff. This would conform to the requirements of the Federal Rules of Civil Procedure.

It is therefore respectfully requested that in lieu of the material in the Order beginning in line 28 of page 2 to the end of page 3, the following be substituted:

“Ordered, that an injunction may issue out of this Court upon the posting of a bond by the defendant, the amount of which is to be promptly determined on evidence presented to the Court within two weeks hereafter enjoining the plaintiff, its agents, servants, employees and attorneys, and all persons in active concert and participation with it be and they are hereby restrained and enjoined, pending the determination of this action, from commencing other actions against the defendant Thompson Chemicals Corporation herein, or against any of its customers, which actions are based upon [39] the alleged infringement by said defendant or by its customers of United States Letters Patent No. 2,258,292; provided that plaintiff shall have the right upon notice to appear before this Court to request permission to file any specific action, but shall have no right to file such action in the absence of express permission from this Court.”

There is one other matter which seems to be somewhat irregular. The original motion by the de-

fendant requested for an Order staying the plaintiff from bringing any further actions against customers of the defendant. The motion did not contain any request for an Order to stay any existing actions. Accordingly, it is improper to include that part of the Order beginning on line 7, page 3, to and including line 19 of that page.

It is requested that the signing of the Order be delayed for about two weeks pending the receipt of advices from Eastern Counsel. In the meanwhile, plaintiff's local counsel can assure the Court that the wishes of the Court in this matter will be meticulously observed, pending the signing of an amended Order. Accordingly, defendant will not be harmed by any slight delay in arriving at a proper wording of the Order.

Dated: May 23, 1956.

FLAM and FLAM, and
CAESAR & RIVISE,

By /s/ JOHN FLAM,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed May 24, 1956. [40]

United States District Court for the Southern
District of California, Central Division

No. 17,987-PH

AMERICAN CHEMICAL PAINT COMPANY,
a Corporation,

Plaintiff,

vs.

THOMPSON CHEMICAL CORPORATION, a
Corporation,

Defendant.

ORDER ENJOINING PLAINTIFF FROM
COMMENCING AND FURTHER PROSE-
CUTING CERTAIN ACTIONS

Defendant's motion to enjoin the plaintiff and its attorneys from bringing further actions against this defendant, or any of its customers, based upon the making and/or selling of the subject matter involved in the present action and which is alleged to infringe United States Letters Patent 2,258,292, until the entry of judgment or other final disposition of the above-entitled cause, having duly come on to be heard by this Court, and the Court having considered the record including the affidavit in support of the motion made by Tellef Senum, Vice-President of the defendant corporation, which affidavit included as exhibits copies of the complaints filed by the plaintiff in the United States District Court for the Eastern District of Washington, Southern Division, and in [42] the United States

District Court for the Eastern District of Washington, Northern Division; and the Court having heard the arguments of counsel and being fully advised; and it appearing to the Court after due deliberation that plaintiff had filed a second action in the United States District Court for the Eastern District of Washington, Southern Division, identified as Civil Action No. 1,079, American Chemical Paint Company vs. Yakima Farmers Supply Co., defendant, and Thompson Chemicals Corporation, intervenor; and that the plaintiff has filed a third action in the United States District Court for the Eastern District of Washington, Northern Division, identified as Civil Action No. 1359, American Chemical Paint Company vs. H. R. Spinner Company, et al., defendants, and Thompson Chemicals Corporation, intervenor; and it appearing to the Court that said actions were filed subsequent to the present action and are based upon the alleged infringement of United States Letters Patent 2,258,292, the alleged infringement of which constitutes a cause of action in the present case; and it further appearing that there is a possibility that the plaintiff will file further actions in other jurisdictions based upon the alleged infringement of the same Letters Patent against other customers of the defendant Thompson Chemicals Corporation herein; and it further appearing to this Court that the defense of a multiplicity of such actions relating to the same cause of action places an unnecessary burden upon the defendant Thompson Chemicals Corporation herein

and is unnecessary to protect the rights of the plaintiff, it is

Ordered, that the plaintiff, its agents, servants, employees and attorneys and all persons in active consort and participation with it be and they hereby are restrained and enjoined, pending the determination of this action, from commencing other actions against the defendant Thompson Chemicals Corporation herein, or against any of its customers, which actions are based upon the [43] alleged infringement by said defendant or by its customers of United States Letters Patent 2,258,292; provided that plaintiff shall have the right upon notice to appear before this Court to request permission to file any specific action but shall have no right to file such action in the absence of express permission from this Court;

And it is Further Ordered that the plaintiff, its agents, servants, employees, and attorneys and all persons in active consort and participation with it be and they hereby are restrained and enjoined, pending the determination of this action, from further prosecuting said action heretofore filed in the United States District Court for the Eastern District of Washington, Southern Division, identified as Civil Action No. 1079, American Chemical Paint Company v. Yakima Farmers Supply Co., defendant, and Thompson Chemicals Corporation, intervenor, and said action filed in the United States District Court for the Eastern Dis-

trict of Washington, Northern Division, identified as Civil Action No. 1359, American Chemical Paint Company v. H. R. Spinner Company, et al., defendants, and Thompson Chemicals Corporation, intervenor;

Further provided that plaintiff shall have the right to present evidence to support its contention that the defendant Thompson Chemicals Corporation is financially unable to make the plaintiff whole for any damage resulting from this injunction and shall be entitled to an inter partes hearing with respect thereto, and if after inter partes consideration this Court shall order that security be given to protect the plaintiff, then and in that event this injunction shall be dissolved unless within fifteen days following the order of this Court said defendant shall provide the necessary security approved by the Court or by the Clerk of the Court.

Dated: May 28, 1956.

/s/ PEIRSON M. HALL,

United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1956.

Docketed and Entered May 29, 1956. [44]

[Title of District Court and Cause.]

No. 17987-PH

MEMORANDUM RELATING TO PLAINTIFF'S
OBJECTIONS TO PROPOSED ORDER
ENJOINING PLAINTIFF

To the Honorable, the Judges of the United States
District Court in and for the Southern District
of California, Central Division

Plaintiff's counsel has objected to the proposed
"Order Enjoining Plaintiff from Commencing and
Further Prosecuting Certain Actions," presented to
this Honorable Court on May 23, 1956, and compris-
ing the substitute filed to replace the form filed May
18, 1956. The objections raise two points, and as
follows:

1. The plaintiff believes that the defendant
should be required to post the bond before the in-
junction issues; and

2. The plaintiff believes that he should not be
enjoined from further prosecuting the actions now
pending in Washington.

Relative to point 1, counsel believes that the Court
distinctly [46] stated that there was no presumption
that the defendant was insolvent, or financially un-
sound, and that if the plaintiff desired that a bond
be posted it should make the showing to establish
the necessity for such bond. No exact time was set
for the making of that showing. It is clear that the

plaintiff well might take an appreciable period of time during which he would not be enjoined. He is already apologizing for his inability to handle the matter promptly.

The proposed form of the order takes care of this situation by enjoining the plaintiff immediately and then providing that a bond shall be posted upon the plaintiff making a showing that a bond should be filed. By so providing the Court's wishes are carried out from the beginning and are not postponed to the indefinite future. It is difficult to see how the plaintiff will be hurt by the proposed order if it intends to abide by the Court's intentions as it indicates.

Relative to point 2, the Court will remember that defendant's attorney stated that the action pending in the District Court at Yakima, Washington, had been stayed by the granting of a Motion to Stay, but that an identical motion had been denied in the District Court of Spokane for no reason which was understood. Defendant's attorney stated that he had been surprised by the denial of this motion at Spokane and that it seemed clear that the injunction should go not only to the filing of new actions but also should stay the further prosecution of all pending actions. With this the Court stated its agreement and directed that the injunction should enjoin the filing of additional actions, and should also enjoin the further prosecution of those other actions now pending. The form of injunction as now drawn so provides.

It is requested that the Honorable Court sign the form now before it, filed May 23, 1956, which is believed to be in full [47] agreement with its directions at the hearing.

Dated: May 29, 1956.

Respectfully submitted,

GRAINGER, CARVER AND
GRAINGER,

WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1956. [48]

[Title of District Court and Cause.]

No. 17,987-PH

NOTICE OF APPEAL

Notice is hereby given that American Chemical Paint Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Enjoining Plaintiff from Commencing and Further Prosecuting Certain Actions, said Order having been entered in this action on May 29, 1956.

Dated: June 19, 1956.

FLAM and FLAM,
CAESAR & RIVISE,

By /s/ JOHN FLAM,
Attorneys for Plaintiff.

Affidavit of Mail attached.

[Endorsed]: Filed June 19, 1956. [50]

[Title of District Court and Cause.]

No. 17987-PH

STIPULATION UNDER RULE 75(f) F.R.C.P.

It Is Hereby Stipulated by and between the parties to this above-entitled action, through their respective counsel, that the following shall constitute the record on appeal:

1. Complaint, dated March 31, 1955.
2. First Amended Answer, dated June 16, 1955.
3. Notice of Motion and Motion to Enjoin Plaintiff, dated April 24, 1956, including exhibits.
4. Defendant's Memorandum and Points and Authorities in Support of Motion to Enjoin Plaintiff, dated April 24, 1956. [51]
5. Plaintiff's Objections to Motion to Enjoin Plaintiff and Answering Memorandum, dated May 3, 1956.

6. Order Enjoining Plaintiff from Commencing and Further Prosecuting Certain Actions, dated May 29, 1956.

7. Plaintiff's Objections to Proposed Order Enjoining Plaintiff from Commencing and Further Prosecuting Certain Actions, dated May 23, 1956.

8. Defendant's Memorandum Relating to Plaintiff's Objections to Proposed Order Enjoining Plaintiff, dated May 29, 1956.

9. Certified copy of Order from the Court for the Eastern District of Washington, Northern Division, entitled American Chemical Paint Company v. H. R. Spinner Company, Civil Action No. 1359, denying defendant's motion to stay proceedings.

10. Stipulation entitled "Stipulation in re Hearing on May 14, 1956."

The certified copy referred to in item No. 9 above will be forwarded to the Clerk of the Court within the next few days.

It is desired by both parties hereto that this appeal be diligently prosecuted to the effect that a prompt determination of the appeal may be had.

Los Angeles, California, June 25, 1956.

FLAM and FLAM, and
CAESAR & RIVISE,

By /s/ JOHN FLAM,
Attorneys for Plaintiff.

Pasadena, California, June 23, 1956.

GRAINGER, CARVER and
GRAINGER, and
WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant.

[Endorsed]: Filed June 26, 1956. [52]

[Title of District Court and Cause.]

No. 17987-PH

STIPULATION IN RE: HEARING
ON MAY 14, 1956

It Is Hereby Stipulated by and between the parties to the above-entitled action, acting through their respective counsel, that at the hearing on the Notice of Motion and Motion to Enjoin Plaintiff before his Honor Judge Peirson Hall on May 14, 1956, the following occurred:

Defendant's attorney stated to the Court that the action pending in the District Court at Yakima, Washington, had been stayed by the granting of a Motion to Stay, but that an identical motion had been denied in the District Court in Spokane for no reason which was understood. Defendant's attorney also stated that he had been surprised by the

denial of the motion at Spokane, and that it seemed clear [53] that the injunction should go not only to the filing of new actions but also to stay the further prosecution of all pending actions. With this the Court stated its agreement and directed that the injunction should enjoin the filing of additional action, and should also enjoin the further prosecution of those other actions now pending.

Los Angeles, California, June 25, 1956.

FLAM AND FLAM,
CAESAR & RIVISE,

By /s/ JOHN FLAM,
Attorneys for Plaintiff.

Pasadena, California, June 23, 1956.

GRAINGER, CARVER AND
GRAINGER, and
WILLIAM DOUGLAS SELL-
ERS,

By /s/ W. D. SELLERS,
Attorneys for Defendant.

[Endorsed]: Filed June 27, 1956. [54]

In the United States District Court, Eastern
District of Washington, Northern Division
Civil Action No. 1359

AMERICAN CHEMICAL PAINT COMPANY, a
Corporation,

Plaintiff,

vs.

H. R. SPINNER COMPANY, a Partnership, and
R. K. ARROWSMITH, R. G. SHILDMYER
and A. R. ROLFS,

Defendants,

and

THOMPSON CHEMICALS CORPORATION, a
Corporation,

Intervenor.

ORDER DENYING STAY

The motion of the defendants and intervenor to stay action in the above-entitled cause, came regularly on for hearing at the call of the calendar before me on this 4th day of May, 1956, and it appearing to the Court that sufficient grounds for said stay have not been shown;

Now, Therefore, It Is Hereby Ordered that the motion of the defendants and intervenor to stay the above-entitled action until the action in the United States District Court for the Southern District of California, Central Division, has been prosecuted to final judgment or otherwise disposed of, be and the same is hereby denied.

Ordered Entered.

Dated this 8th day of May, 1956.

SAM M. DRIVER,
Judge.

Certified true copy.

[Endorsed]: Filed May 8, 1956, U.S.D.C.,
Eastern District of Washington.

[Endorsed]: Filed June 29, 1956, U.S.D.C.,
Southern District of California. [55]

[Title of District Court and Cause.]

No. 17987-C

CERTIFICATE OF CLERK

I, John A. Childress, clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 55, inclusive, contain the original.

Complaint;

First Amended Answer;

Notice of Motion and Motion to Enjoin Plaintiff;

Memorandum and Points and Authorities in Support of Motion to Enjoin Plaintiff;

Objections to Motion to Enjoin Plaintiff and Answering Memorandum;

Objections to Proposed Order Enjoining

Plaintiff from Commencing and Further Prosecuting Certain Actions;

Order Enjoining Plaintiff from Commencing and Further Prosecuting Certain Actions;

Memorandum Relating to Plaintiff's Objections to Proposed Order Enjoining Plaintiff;

Notice of Appeal;

Stipulation Under Rule 75(f) F.R.C.P.;

Stipulation in Re: Hearing on May 14, 1956;

Order Denying Stay;

all in the above-entitled case; constitute the contents of the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 11th day of July, 1956.

[Seal]

JOHN A. CHILDRESS,

Clerk.

By /s/ CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15189. United States Court of Appeals for the Ninth Circuit. American Chemical Paint Company, a Corporation, Appellant, vs. Thompson Chemical Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 12, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,189

AMERICAN CHEMICAL PAINT COMPANY,
a Corporation,

Plaintiff-Appellant,

vs.

THOMPSON CHEMICAL CORPORATION, a
Corporation,

Defendant-Appellee.

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY UNDER RULE 75(d) F.R.C.P.

Notice is hereby given that plaintiff-appellant will rely in this appeal upon the following points:

1. The District Court erred in restraining plaintiff from commencing other actions against defendant or any of its customers anywhere else pending determination of the above-cause.

2. The District Court erred in ordering plaintiff to refrain from further prosecuting pending suits against defendant's customers in the State of Washington.

3. The District Court erred in ordering plaintiff to refrain from further prosecuting the action of plaintiff, American Chemical Paint Company vs. H. R. Spinner Company, et al., Civil Action No. 1359 in the Eastern District of Washington, North-

ern Division, where just three weeks prior to the instant Order, J. Driver, on May 8, 1956, denied a motion to stay said action which was brought by defendant who appeared as an intervener in said action.

4. The District Court erred in making plaintiff's right to commence other actions against defendant or any of its customers dependent upon plaintiff's obligation to obtain express permission from the District Court.

5. The District Court erred in providing that the dissolution of said Order is dependent upon plaintiff's obligation to present evidence of defendant's financial inability to make plaintiff whole for any damage resulting from said order.

6. The District Court erred in providing that defendant is not required to provide security until after plaintiff moves for dissolution of the Order and the plaintiff presents evidence of defendant's financial inability to make plaintiff whole for any damage resulting from said Order.

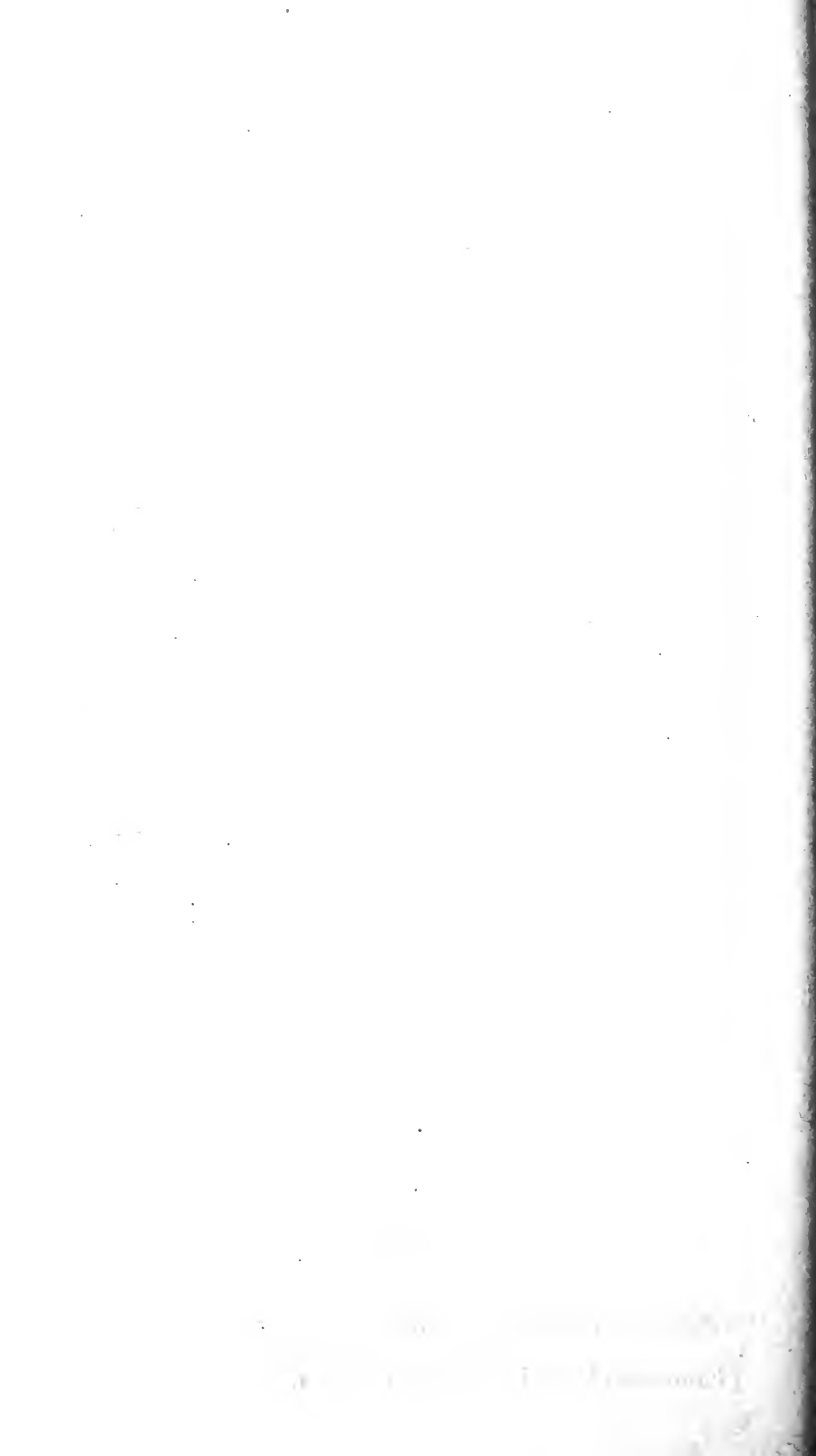
Dated: July 16, 1956.

FLAM and FLAM, and
CAESAR & REVISE,

By /s/ JOHN FLAM,
Attorneys for
Plaintiff-Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed July 17, 1956.



No. 15,189

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CHEMICAL PAINT COMPANY, a corporation,
Plaintiff-Appellant,

vs.

THOMPSON CHEMICAL CORPORATION, a corporation,
Defendant-Appellee.

BRIEF ON BEHALF OF APPELLEE.

WILLIAM DOUGLAS SELLERS,
16 North Marengo Avenue,
Pasadena 1, California,
Attorney for Defendant-Appellee.

FILE

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PAUL P. O'BRIEN, CL

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No. 15,189

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CHEMICAL PAINT COMPANY, a corporation,
Plaintiff-Appellant,

vs.

THOMPSON CHEMICAL CORPORATION, a corporation,
Defendant-Appellee.

BRIEF ON BEHALF OF APPELLEE.

Statement of the Case.

Defendant-appellee wishes to supplement the plaintiff-appellant's statement of the case by the following:

1. The present case was the first filed case [R. 34].
2. Each of the cases comprises an action based upon the alleged infringement of United States Letters Patent 2,258,292 [R. 4, 18, 19, 22].
3. The party plaintiff and the defendant Thompson Chemicals Corporation are parties to all of the actions [R. 34].
4. The defendant Thompson Chemicals Corporation admits it is the manufacturer of the product ANA-Amide sold by the defendants Yakima Farmers Supply Co. and H. R. Spinner Company named in the other cases, and admits its primary responsibility for any actual infringement [R. 16].

5. The order complained of which enjoined the plaintiff from prosecuting the later filed actions, or from filing other actions, expressly gave to the plaintiff the clearcut opportunity to have the injunction dissolved upon presenting evidence to support its contention that the defendant is financially unable to make the plaintiff whole for any damage resulting from the injunction [R. 36].
6. The order complained of also gave to the plaintiff the right to request permission to file additional actions upon notice [R. 35].
7. The actual fact is that the primary purpose of the plaintiff in prosecuting a multiplicity of identical infringement actions based upon an alleged infringement of patent, which to date is little more than experimental, is primarily to harass this defendant and put it to unnecessary expense [R. 16].

ARGUMENT.

I.

It Is the Proper Exercise of the Court's Discretion to Enjoin the Prosecution of Later Filed Actions Relating to the Same Issues and Involving the Same Parties.

The District Court in the exercise of its discretion enjoined the plaintiff from the further prosecution of the two later filed Washington actions involving questions of patent infringement and patent validity identical to the present case, and in which the present defendant was a party. This was clearly a proper exercise of the Court's discretion and is supported by a long line of decisions including the decision of the Third Circuit Court of Appeals, *The Crosley Corporation v. Hazeltine Corporation* (C. C. A. 3, 1941), 122 F. 2d 925, 51 U. S. P. Q. 1.

In *The Crosley v. Hazeltine* action, the Court, after citing Chief Justice Marshall in *Smith v. McIver*, 22 U. S. (9 Wheat. 532, 535) to the effect:

"In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it."

went on to justify its ruling in the following words:

"The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us

to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

The appellant makes no serious responsible contention that the Court does not have the right in its discretion to grant the injunction, at least the decisions which it cites are not persuasive.

The contention that there is a separate cause of action against the manufacturer and against the seller requires little discussion. However, as was stated by the Court of Appeals of the Second Circuit in the *Bechik Products* case upon which the plaintiff relies:

" . . . any damages which the plaintiff would thus be precluded from recovering from other contributory infringers in future actions are recoverable from the defendant manufacturer in this action. . . ."

Bechik Products Inc. v. Flexible Products, Inc.,
(C. C. A. 2, 1955), 225 F. 2d 603, 106 U. S.
P. Q. 340.

The case *Helene Curtis Industries, Inc. v. Sales Affiliates, Inc.* (C. C. A. 2, 1952), 199 F. 2d 732, 95 U. S. P. Q. 172, cited by the plaintiff is really in point for the defendant. The lower court enjoined the prosecution of a multiplicity of actions and the Court of Appeals affirmed.

In the *Artvale, Inc. v. George Knitting Mills, Inc.* decision relied upon by the appellant and found at 110

U. S. P. Q. 179 (D. C. E. D. N. Y.), decided July 5, 1956, actually there was an application for a stay of the trial in the case in which the motion was filed. Additionally, it appears that in one of the actions there was an unfair competition count involved whereas in the other action there was only patent infringement.

In *International Nickel Co. v. Ford Motor Co.* case, (D. C. S. D. N. Y., 1952), 108 Fed. Supp. 833, 95 U. S. P. Q. 356, again the appellant relies upon a case which really does not support its position and which is readily distinguished. In that case there were different parties in the two actions and different subject matter. International Nickel had sued Ford in the action before the Court, whereas in the other suit the defendant was Martin J. Barry, Inc. Furthermore, the subject matter was different, for Lincoln automobile parts were involved in one action and Ford automobiles parts in the other. The Court, however, based its decision upon the grounds that different parties were involved.

The decisions relied upon by the appellant in its argument under its Point I clearly do not support the contention that the patentee has an inalienable right to maintain a multiplicity of actions or that it does not lie within the proper discretion of the Court to enjoin later-filed actions relating to the same issues, and particularly where the same parties are involved.

II.

The Posting of Security Is Not a Prerequisite to the Granting of a Preliminary Injunction Against the Filing or Prosecuting of Other Actions Upon the Same Issues.

The basis for the contention that the giving of security is a prerequisite and condition precedent to the issuance of the injunction is premised upon F. R. C. P. 65(c) which reads in part as follows:

“(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

The Court of Appeals of the Seventh Circuit in *Urbain v. Knapp Brothers Mfg. Co.* (1954), 217 F. 2d 810, 20 Fed. Rules Serv. 52a.2, Case 1 said:

“... we are of opinion that the failure of the District Court to require the prescribed security before issuing the restraining order is not reversible error. The rule leaves it to the the District Judge to order *the giving of security in such sum as the Court considers proper*. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge. Moreover, in the circumstances encountered here, it would appear that no material damage will ensue to appellants from the failure of the District Judge to require bond of appellees.” (Emphasis added.)

In that case the suit was based upon alleged patent infringement and appellants appealed from an injunction restraining them from proceeding with another action.

In the present case the Judge did grant the injunction without requiring security but the rights of the appellant were protected in a manner which made this appeal entirely unnecessary in that:

1. The order expressly provided that should the plaintiff-appellant desire to file any additional actions it should "have the right upon notice to appear before this Court to request permission to file any specific action"; and
2. That "plaintiff shall have the right to present evidence to support its contention that the defendant Thompson Chemicals Corporation is financially unable to make the plaintiff whole for any damage resulting from this injunction and shall be entitled to an *inter partes* hearing with respect thereto, and if after *inter partes* consideration this Court shall order that security be given to protect the plaintiff, then and in that event this injunction shall be dissolved unless within fifteen days following the order of this Court said defendant shall provide the necessary security approved by the Court or by the Clerk of the Court."

If this appellant felt that it was in any real danger, its remedy was made clear by the order itself and it had only to provide evidence showing the necessity for the bond and the court would so have ruled.

Had the appellant desired to file additional cases, its remedy also was made clear by the order, and had it been able to show that additional cases were necessary in order to protect its interests the opportunity to be heard upon the matter was expressly provided.

To insist that the District Court is bound to require the defendant-appellee to put up a bond to protect the plaintiff in view of the safeguards which the order gave to it is to deprive the Court of that discretion which clearly belongs to it under the law.

Conclusions.

The District Court in the proper exercise of its discretion granted the order enjoining the plaintiff from prosecuting its actions in the District Courts in Washington gave the plaintiff-appellant the opportunity, if it really believed a bond was necessary, to demand a bond upon presenting the basis for that belief.

The District Court also properly exercised its discretion in enjoining the plaintiff-appellant from the filing of further actions relating to the same issues and against other customers (contributory infringers) of this defendant-appellee in that the plaintiff-appellant's rights were protected by the provision of the order that if plaintiff-appellant believed it should file additional actions it had the right to be heard.

It is respectfully contended that the order was properly issued by the District Court and that this appeal should be dismissed with prejudice, costs, and attorneys fees to the appellee.

Respectfully submitted,

WILLIAM DOUGLAS SELLERS,
Attorney for Defendant-Appellee.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15,189

AMERICAN CHEMICAL PAINT COMPANY,
a corporation,
PLAINTIFF-APPELLANT,

VS.

THOMPSON CHEMICAL CORPORATION,
a corporation,
DEFENDANT-APPELLEE.

BRIEF FOR APPELLANT

FLAM & FLAM,
and
CAESAR & RIVISE,
1321 Arch Street,
Philadelphia 7, Pa.,
Attorneys for Plaintiff-Appellant.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

FILED

OCT 9 1956

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CHEMICAL PAINT COMPANY,
a corporation,
APPELLANT,

VS.

THOMPSON CHEMICAL CORPORATION,
a corporation,
APPELLEE.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

The District Court on May 29, 1956 granted an Order (R. 33-36) enjoining plaintiff-appellant from commencing and further prosecuting certain actions, namely patent infringement suits.

Federal jurisdiction is, therefore, based on the Patent Statutes, 35 U. S. C.

The Appeals Court has jurisdiction of the instant appeal by virtue of 28 U. S. C. 1292.

Statement of the Case.

This is an appeal from an Injunctive Order (R. 33-36) granted on May 29, 1956 by the District Court enjoining

plaintiff-appellant from commencing patent infringement actions against defendant-appellee or its customers and from further prosecuting patent infringement actions which were earlier instituted by plaintiff-appellant against certain of defendant-appellee's customers in the State of Washington.

The action was originally commenced by plaintiff against defendant on March 31, 1955 in the U. S. District Court Southern District of California, Central Division. The complaint (R. 3-6) charging defendant with infringement of U. S. Letters Patent No. 2,258,292 seeks an injunction and an accounting of profits and damages.

A first amended answer (R. 6-13) was filed on June 16, 1955.

On February 9, 1956, plaintiff instituted suit for infringement of said Letters Patent against Yakima Farmers' Supply Co. in the U. S. District Court, Eastern District of Washington, Southern Division, Civil Action No. 1079 (R. 17-20). Defendant herein intervened and moved for a stay, which motion was granted on April 3, 1956.

On March 1, 1956, plaintiff instituted suit for infringement of said Letters Patent against H. R. Spinner Company *et al.* in the U. S. District Court for the Eastern District of Washington, Northern Division, Civil Action No. 1359 (R. 21-24).

Here again, defendant herein intervened and moved for a stay, but the stay was denied on May 8, 1956 (R. 44-45).

On April 24, 1956 defendant moved (R. 13-14) in the instant action to enjoin plaintiff from continuing prosecution of the Washington suits and from commencing suits elsewhere.

Over plaintiff's objections (R. 27-32), the District Court on May 29, 1956 granted defendant's motion.

The instant appeal from this injunction was noted on or about June 19, 1956 (R. 39-40).

Specification of Errors.

The District Court erred in providing in its injunctive order that:

1. Plaintiff, during the pendency of this action, may not commence other actions for infringement of Patent 2,258,292 against defendant or its customers anywhere else.

2. Plaintiff must seek permission of the District Court for the Southern District of California, Central Division to commence any other infringement suit against a customer of defendant anywhere else.

3. Plaintiff, during the pendency of this action, may not continue prosecution of the suit against H. R. Spinner Company *et al.* in the Eastern District of Washington, Northern Division, Civil Action No. 1359, notwithstanding the fact that said court refused a stay of the proceedings as late as May 8, 1956.

4. Plaintiff can re-institute said suit against H. R. Spinner Company *et al.* only after it, plaintiff, applies for permission from the California District Court and also presents evidence of defendant's financial inability to make plaintiff whole for any damage resulting from the injunction.

ARGUMENT.

I. Patent owner has right to maintain and institute suits for infringement against dealer-customers of an infringing manufacturer.

It is well settled that prior to a determination of a patent's invalidity the patent owner has a cause of action, separate and independent from that against an infringing manufacturer, to recover profits and damages and to restrain one who resells a product which he purchased from an infringing manufacturer. *Birdsell v. Shaliol*, 1884, 112 U. S. 485, 5 S. Ct. 244, 28 L. Ed. 768.

It is not unusual for a patent owner to litigate in more than one court and a relatively simple case may be allowed to go forward simultaneously in diverse courts. *Helene Curtis Industries, Inc. v. Sales Affiliates, Inc.*, 2 Cir., 1952, 199 F 2d. 732.

Moreover, even where the issues and the parties are the same and two suits are pending in different districts of the same circuit, it is within the discretion of the court to deny a stay of the later filed suit if, as a matter of calendar practice, the chances are that the later filed suit will be reached for trial first. *Artvale, Inc. v. George Knitting Mills, Inc.*, 110 USPQ 179 (D. C. E. D. N. Y.—July 5, 1956) —no federal citation.

The question in the instant case is, therefore, whether the facts present such compelling circumstances as to warrant enjoining pending and future actions which are otherwise allowable.

It is respectfully submitted that the District Court's injunction herein is unwarranted on the basis of the facts and judicial decisions relating thereto.

In the instant case, plaintiff sued defendant in California for infringement of its patent 2,258,292. Depositions of defendant's officials were then taken which disclosed that defendant had sold the infringing composition to various dealers.

On the basis of plaintiff's general knowledge of defendant as confirmed by Dun & Bradstreet reports, it was concluded that the defendant is not financially stable and suits were therefore instituted against two dealers in the State of Washington.

In view of this suspected financial instability of the defendant, plaintiff is justified in maintaining its two suits against defendant's dealer-customers in the State of Washington and is justified in the institution of additional suits elsewhere if necessary.

Furthermore, a suit against an infringing manufacturer's dealer-customer is not the same as a suit against the manufacturer itself. For one thing, the parties are different. For another, the dealer-customer's liability depends upon the extent of resale to ultimate consumers, farmers herein, of an infringing composition purchased from the manufacturer and possibly from some other source. And yet for another, the dealer-customer may resell the infringing composition to farmers after dilution of the composition.

Therefore, the facts relating to the nature and extent of the dealer-customer's infringing acts are necessarily different from those involved in the instant California suit against the manufacturer defendant. *International Nickel Co. v. Ford Motor Co.*, 108 F. Supp. 833 (D. C. S. D. N. Y.—1952).

As to the element of liability, it is clear that one infringer is not relieved by payment by another infringer, but each is accountable for the profits which he has received. Thus the dealer-customer's infringement, that is profits derived from the resale to farmers, cannot be relieved by defendant's payment to plaintiff for defendant's infringement, namely the profits derived by defendant from its sales to the dealer-customer.

Hazeltine Corporation v. Atwater Kent Mfg. Co.,
34 F. 2d 50 (D. C. E. D. Pa.—1929);

Kryptok Co. v. Stead Lens Co., 190 Fed. 767 (C.
C. A., 8th—1911);

Sherman, Clay & Co. v. Searchlight Horn Co., 225
Fed. 497 (C. C. A., 9th—1915);

*Triangle Conduit & Cable Co., Inc. v. National
Electric Products Corporation*, 138 F. 2d 46
(C. C. A., 3rd—1943).

In said *Triangle* case, *supra*, the Court at pages 47 and 48 stated the proposition of law as follows:

“We think that the injunction against the prosecution of the severed cause of action against Sears should not have issued. It must be remembered that the duty of a United States district court to enjoin further prosecution of a proceeding later instituted in another United States district court arises only if the controversy in each court involves the same issues and the same parties. *Crosley Corporation v. Hazeltine Corporation*, *supra*. It is true that the validity and infringement of the same six patents are at issue in both courts. The parties, however, are not the same. In the Delaware district court the litigants are National, the owner of the patents and Triangle, the alleged infringing manufacturer. In the Michigan district court the litigants are National, the owner of

the patents, and Sears, a retail dealer whose tort is alleged to be the resale of products manufactured in infringement of the National patents. It will not do to say that the suit against Sears is in reality a suit against Triangle. It is well settled that a patent owner has a cause of action, separate and independent from that against an infringing manufacturer, to recover profits and damages and to restrain one who resells a product which he purchased from an infringing manufacturer. *Birdsell v. Shaliol*, 1884, 112 U. S. 485, 5 S. Ct. 244, 28 L. Ed. 768; *Sherman, Clay & Co. v. Searchlight Horn Co.*, 9 Cir., 1915, 225 F. 497; *Kryptok Co. v. Stead Lens Co.*, 9 Cir., 1911, 190 F. 767, 39 L. R. A., N. S., 1. This right of action continues so long as the questions of validity and infringement have not been finally adjudicated."

II. There are no compelling reasons to enjoin plaintiff from maintaining and instituting infringement suits against defendant's customers.

The equities of the case at bar are clearly in favor of the plaintiff. There was no warrant for the issuance of the injunctive order by the District Court.

Plaintiff has filed only two additional suits for infringement, both against defendant's dealer-customers and both in the State of Washington. They were instituted because plaintiff believes defendant to be financially unstable and to attempt to secure redress for infringements resulting from resales by dealers.

By no stretch of the imagination can this activity on the part of the plaintiff be considered "forum shopping with a vengeance". Moreover, there is nothing in the record to indicate that the plaintiff is threatening an army of suits.

When there have been only a few suits against customer infringers in addition to that against the manufacturer infringer, there is no compelling reason to enjoin such suits.

In addition, only three weeks prior to the issuance of the instant injunctive order, the Court in the suit against H. R. Spinner Company *et al.*, Civil Action No. 1359, in the Eastern District of Washington, Northern Division denied defendant's motion to stay said action (R. 44-45).

It is respectfully submitted that the California Court's action was not only inequitable but that it did not, in fact, have the power to undo the decision of the Washington Court.

III. District Court may not enjoin plaintiff from maintaining and instituting infringement suits against defendant's customers without requiring evidence from defendant of its financial stability and a bond.

Because there must be compelling circumstances before a Court will issue an injunction against maintenance and institution of further infringement suits, the Courts have conditioned the issuance of such an injunction upon the assurance that the defendant is financially responsible and upon the posting of a bond. *Pierce v. Allen B. Du Mont Laboratories, Inc.*, 108 USPQ 362 (D. C. D. Dela.—1956); *Bechik Products v. Flexible Products*, 225 F. 2d 603 (2nd Cir.—1955).

In said *Bechik* case, on p. 607 of its Opinion, the Court stated the rule as follows:

“However, we think that the court should not, by a stay in the institution of suits against defendant's customers, put damages for which the defendant is liable beyond the reach of recovery from the cus-

tomers, without assurance that the defendant will be financially able to discharge its liability therefor.

We hold, therefore, that the injunction restraining the institution of suits against other contributors to Flexible's infringement may issue only on condition that Flexible furnish a bond conditioned on its payment to the plaintiff of any pecuniary award which may be made to it in this case. That the issuance of the injunction so conditioned is within the discretion of the court, we have no doubt. *Hecht Co. v. Bowles*, 321 U. S. 321, 329-330, 64 S. Ct. 587, 88 L. Ed. 754."

In the instant case, the court did not require the defendant to give assurances of its financial responsibility and a bond conditioned on its payment to plaintiff of any pecuniary award which may be made in the case.

Instead it made it mandatory for plaintiff to present evidence of defendant's financial inability to the District Court at a time when plaintiff should seek to set aside the order.

This is clearly inequitable and an abuse of the District Court's discretion.

It is further an abuse of the District Court's discretion in that it is violative of F. R. C. P. Rule 65(c) which states, in part:

"(c) *Security*. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Conclusions.

The District Court abused its discretion in granting an order enjoining plaintiff from maintaining its action against H. R. Spinner and Company in the Eastern District of Washington, Northern Division, Civil Action No. 1359 when, but three weeks earlier, said Washington court denied defendant's motion for a stay.

The District Court abused its discretion in granting an order enjoining plaintiff from commencing any suit anywhere else against defendant's customers, knowing as it did that only two other suits were filed in the State of Washington, one of which was already stayed.

The District Court abused its discretion by refusing to demand evidence of defendant of its financial responsibility.

The District Court abused its discretion by failing to demand a bond for security from the defendant.

The District Court abused its discretion by making it mandatory that plaintiff come to it for specific permission to reopen and file new suits conditioned upon plaintiff's duty to prove defendant's financial irresponsibility.

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